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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984

THE PLAINTIFFS in all cases which have been consolidated into this proceeding by order of the Judicial Panel on Multidistrict Litigation dated February 6, 1985, and Order of this Court dated April 25, 1985, together with those Plaintiffs in all other related actions which may be consolidated subsequent to the filing of this notice of appeal, including but not limited to all those cases which the undersigned are aware of, except *The Union of India v. Union Carbide Corporation*, No. 85 Civ. 2696 and except those cases consolidated as shareholders or derivative cases by EXECUTIVE COMMITTEE MEMBERS, STANLEY M. CHELSEY and F. LEE BAILEY,

Petitioners,

VS.

THE UNION OF INDIA AND UNION CARBIDE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Where the plaintiffs have demonstrated that a foreign court has unconscionable delays, should the district court be prohibited from finding that an adequate alternative remedy exists and, as a result, be proscribed from dismissing plaintiffs' case on the grounds of forum non conveniens?
2. Should the district court be prohibited from applying the *Piper* and *Gilbert forum non conveniens* standards in such a manner as to ignore the realities of modern litigation and technology?
3. Did the district court and court of appeals err in failing to hold a fairness hearing?

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Petitioners, the Individual Plaintiffs, plaintiffs below, pray that a writ of certiorari issue to review the decision and order of the United States Court of

Appeals for the Second Circuit modifying and affirming the United States District Court's opinion, which dismissed all personal injury and property damage cases arising out of the Bhopal disaster on the grounds of *forum non conveniens*.

OPINIONS BELOW

The opinion of the court of appeals is reported at 809 F.2d 195 (2d Cir. 1987) and is printed at Appendix 1a. The opinion of the district court is reported at 634 F. Supp 842 (S.D.N.Y.) and is reproduced in the Appendix at 25a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 14, 1987. A timely petition for rehearing was filed, and that petition was denied on February 26, 1987. The 60th day after this denial is April 27, 1987. This petition was filed on or before Monday, April 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a) and 2101(c).

STATUTORY PROVISIONS INVOLVED

This case involves no particular statute of the United States.

STATEMENT OF THE CASE

This petition arises out of the dismissal of certain cases involving alleged personal injuries and property damage caused by the release of toxic methyl isocyanate (MIC) fumes from the Union Carbide of India (UCIL) plant at Bhopal, India, which killed approxi-

mately 2,000 people and injured at least another 200,000 individuals. Various plaintiffs filed numerous complaints in Federal courts throughout the country based upon a diversity of citizenship jurisdiction. On February 6, 1985 the Judicial Panel of Multidistrict Litigation consolidated all of the cases pursuant to 28 U.S.C. sec. 1407 for consolidated and coordinated pretrial proceedings. *In Re Union Carbide Bhopal Gas Plant Disaster Litigation at Bhopal, India*, 601 F. Supp. 1035 (J.P.M.L. 1985).

On April 25, 1985 Judge Keenan entered the first pretrial order, which organized the case. As a part of that order, Judge Keenan appointed a three member Plaintiffs' Executive Committee. Two members of that Committee, Stanley M. Chesley and F. Lee Bailey, were appointed to act on behalf of individual plaintiffs. The third member, Michael V. Ciresi, was appointed to act on behalf of the Union of India.

On June 30, 1985 the Individual Plaintiffs and the Union of India each filed amended consolidated complaints. On July 31, 1986, Union Carbide Corporation (UCC) filed a motion to dismiss the complaint on the grounds of *forum non conveniens*. Following its motion, Judge Keenan permitted discovery relating to the *forum non conveniens* motion. He heard arguments on January 3, 1986 and filed an opinion and order on May 12, 1986 dismissing the case on the grounds of *forum non conveniens* subject to UCC's acceptance of certain conditions.

Prior to the entry of the May 12, 1986 order, counsel for the Individual Plaintiffs reached a tentative settlement agreement with UCC for $350,000,000. The Union of India declined to participate in the proposed settlement. On May 21, 1986

the Individual Plaintiffs moved the Court for an order scheduling a fairness hearing. [App. at 94a]. On May 28, 1986 Judge Keenan entered an order denying this motion. [App. at 100a].

The May 28, 1986 order also clarified certain aspects of the conditions of the dismissal, noted that the May 12, 1986 Opinion and Order was not final and gave UCC until June 12, 1986 to accept the conditions. On June 12, 1986, UCC accepted the conditions subject to UCC's right to appeal the imposition of the conditions. On June 24, 1986 Judge Keenan entered an order dismissing the action. On June 26, 1986 the Individual Plaintiffs filed their notice of appeal in the Second Circuit Court of Appeals. On July 10, 1986, Union Carbide filed its notice of cross appeal. The Second Circuit issued its opinion affirming and modifying Judge Keenan's order of dismissal on January 14, 1987, and on February 26, 1987 the Second Circuit Court of Appeals denied the Individual Plaintiffs' Motion For Rehearing

The facts of the case are relatively complex and were exhaustively presented to both the district court and the court of appeals. For the purpose of this petition, however, only a few key and undisputed facts need to be discussed. The plaintiffs, throughout the case have contended that Union Carbide Corporation exercised control over its subsidiary Union Carbide of India, Ltd., and that Union Carbide Corporation is liable because its negligence in permitting the deadly MIC to be stored proximately caused the accident. It is undisputed that almost all of the key management personnel regarding these contentions are in the United States. Equally as undisputed is

the fact that there are numerous witnesses in India and in other parts of the world.

The issue before both lower courts was how to balance these witnesses and other factors to determine the appropriate jurisdiction. Again, for the purposes of this petition, a few other key facts are also significant. All but 12 of the plaintiffs are Indian. Union Carbide Corporation, obviously, is a large multinational corporation, which was sued in its home state, New York. As the Court well knows, and as Union Carbide has conceded, the Bhopal disaster has had national and international ramifications. Thus, the issue before the Court is whether a United States Court will hear the case.

As noted above, the Individual Plaintiffs appealed to the Second Circuit Court of Appeals. The Court of Appeals affirmed Judge Keenan's order with certain modifications. Judge Keenan had ordered that Union Carbide agree to satisfy any judgment rendered against it in India and also ordered that Union Carbide be subject to discovery in India under the Federal Rules of Civil Procedure. [App. at 56a]. The Court of Appeals found these two provisions to be inappropriate and deleted them, but in all other respects affirmed Judge Keenan [App. at 56a].

REASONS FOR GRANTING THIS WRIT

This case presents an important question of the subject matter of the district court over suits in which United States and foreign plaintiffs bring suit in the United States against a United States corporation for a massive industrial accident which occurred in a foreign country. The jurisdiction of the district court was clearly based upon 28 U.S.C. §1332 (diversity of cit-

izenship). The district court dismissed and the appellate court affirmed the dismissal on the grounds of *forum non conveniens*, a judicially created means of thwarting the clear jurisdiction of the district court to hear the cases. Both the district court and appellate court based their decisions upon two cases decided by this Court, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp, v. Gilbert*, 330 U.S. 501 (1947). These cases permit the dismissal of cases over which the district court has jurisdiction where the court finds that the maintenance of the lawsuit in the United States is inconvenient based upon a balancing of a number of factors. Both the district court and the court of appeals, however, merely applied the standards in these two cases in a rote manner and failed to consider the significant grounds for retaining jurisdiction.

This case also concerns an important aspect of judicial administration. The Individual Plaintiffs reached a tentative settlement of $350,000,000 with Union Carbide and sought, but were denied, a fairness hearing. Thus, this Court has before it an important question of judicial administration.

This Court should grant Certiorari because the district court and appellate court misapplied this Court's decision in *Piper*, *supra* and *Gilbert*, *supra* in that they (1) erred in holding that the Indian legal system provided the plaintiffs with a remedy and (2) misapplied the balancing tests enunciated in *Piper*, *supra* and *Gilbert*, *supra*. In addition, this Court should grant a certiorari to consider whether the district court should have granted a fairness hearing.

I. Where The Plaintiffs Have Demonstrated That A Foreign Court Has Unconscionable Delays, That Foreign Court Fails To Provide An Adequate Forum And The District Court Should Not Dismiss Plaintiffs' Action On The Grounds of Forum Non Conveniens

In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) this Court emphasized that, as a condition precedent to dismissal the court must find that an adequate alternative foreign forum exists. This Court stated:

> At the outset of any *forum non conveniens* inquiry, the Court must determine whether there exists an adequate alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.

454 U.S. at 254 n. 22. This finding is crucial to any dismissal, yet both the district court and court of appeals glossed over the glaring deficiencies of the Indian legal system in dismissing the case.

The root of the inadequacy of the Indian legal system is the unconscionable delays which beset every litigant. It is undisputed that delays in India are so endemic that cases routinely take up to 20 years to be decided [App. at 78a]. Indeed, the Union of India conceded in the district court that its own courts could not handle the Bhopal litigation. The Union of India stated:

> The fundamental structure of the Indian judicial system could result in decades of litigation if the victims are denied this chosen forum.

[App. at 76a]. Further, the Union of India admitted:

> Due to procedural constraints and the pending backlog of cases, the adjudication in India of claims arising from the Bhopal disaster would inevitably lead to delay of such magnitude that the prosecution of such claims would be effectively frustrated.

[App. at 76a]. Thus, no question exists that enormous delays are inherent in every case.

Both the district court and the court of appeals ignored the obvious inadequacy of a remedy which requires twenty years to occur. The district court merely assumed (but did *not* find as the court of appeals stated) that India would do something to prevent the Bhopal litigation from being mired in traditional Indian legal delay. [App. at 34a]. The district court could only exhort the Indian judicious to "stand tall before the world." It could do nothing, however, to cure the glaring deficiencies in India's judicial system.

Since the dismissal, we have the unfortunate opportunity to have seen, first hand, that the delays which the Individual Plaintiffs predicted have, in fact, occurred. To date, the Union of India has filed a complaint and Union Carbide has filed a response. The litigation now has its third judge. The first judge was injured in a bus accident. The second judge was disqualified, because he had secretly filed a claim for compensation as one of the victims of the disaster.

Nothing of substance has occurred and nothing much will occur in the near future. Unfortunately, the Indian legal system cannot handle the case and, therefore, it never should have been dismissed, because no adequate alternative forum exists.

II. The District Court Should Not Apply The Piper and Gilbert Standards In Such A Manner As To Ignore The Realities of Modern Litigation And Technology

With respect to a *forum non conveniens* decision, a district court's misinterpretation of the law will almost always amount to lending improper weight or emphasis to certain recognized principles of *forum non conveniens* doctrine. The basic rules—at least their authoritative articulation—are easily extracted from *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947). The real problem lies in adjusting the *Gilbert* considerations to the contemporary world, in fitting them to the particular case at hand, in finding the appropriate balance and emphasis. As the *Gilbert* court recognized, ". . . the combination and weight of factors requisite to given results are difficult to forecast or state . . ." *Gulf Oil v.Gilbert, supra* at 508.

Forum non conveniens, compared to most doctrines, is flexible; it is to be adapted to the facts of each case. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981) (recognizing "the need for flexibility" and that "each case turns on its facts"); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 528 (1947) (recognizing that "each case turns on its facts.")

Further, the breadth of the *forum non conveniens* inquiry is suggested by courts' frequent concern for "justice" and "fairness." The *Piper* court stated that "the district court may conclude that dismissal would

not be in the interests of justice." *Piper Aircraft Co. v. Reyno*, *supra* at 255. ". . . The ultimate inquiry," the Court stated in *Koster v. Lumbermens*, *supra* at 527. ". . . is where trial will best serve the convenience of the parties and the ends of justice." According to *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir. 1966), "The issue of convenience aside, the more important question is whether the relinquishment of jurisdiction would best serve the ends of justice."

A court considering a *forum non conveniens* motion must, therefore, take a broad view, considering the consequences of dismissal on the parties. Would dismissal of the case prejudice a plaintiff's interest to such a degree that any gains in convenience would not be justified? Would the foreign forum treat a plaintiff's case so differently from the initial forum that fundamental principles of equality, of treating like cases alike, would be undermined? A mechanical application of the considerations set forth in *Gilbert*, as if the *Gilbert* language were equivalent to a clear statutory directive, is inadequate. *Forum non conveniens* is an equitable doctrine that requires a flexible and judicious examination of the facts before the Court.

In addition to flexibility and the need for justice and fairness, the basic purpose of the *forum non conveniens* doctrine is to serve the convenience of the litigants. See *Piper Aircraft v. Reyno*, *supra* at 250 (Convenience central purpose of doctrine); *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508 (1947) (court should consider "practical problems that make trial of a case easy, expeditious and inexpensive"); *Koster v. Lumbermens*, *supra* at 527 (". . . ultimate inquiry

is where trial will best serve the convenience of the parties and the ends of justice"); See *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 65, 66 (2d Cir. 1981). Convenience, however, must be viewed in light of the revolutionary advances in transportation and communication. Whereas it would be inconvenient in 1947 to have a box of documents and witnesses located on the other side of the world, today that inconvenience is *de minimus*. Jet travel, photocopying technology, videotape, satellite rays, one day mail delivery have greatly reduced the significance of a chosen forum's distance from relevant evidence.

In *Manu International, S.A. v. Avon Products, Inc.*, *supra* at 65, the Court observed:

> Additionally, there has been much recent sentiment in this Circuit for evaluating the forum non conveniens factors in light of the increased speed and ease of travel and communication which makes, especially when a key issue is the location of witnesses, no forum "as inconvenient [today] as it was in 1947." *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 457 (2d Cir. 1975) (Oakes, J., dissenting).

The Court went on to cite Judge Newman's concurrence in *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980):

> "First, the plaintiff's choice of forum is to be respected unless the balance of both public and private interests strongly justifies a transfer.

* * *

> "Second, the assessment of whether the balance of public and private interests strongly overcomes the plaintiff's choice of forum must be made in light of the realities of modern transportation and communications. A forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel. It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit. Jet travel and satellite communications have significantly altered the meaning of 'non conveniens.'
>
> There is an understandable temptation in a busy district like the Southern District of New York to transfer cases that can as appropriately or even slightly more appropriately be tried elsewhere. That temptation must be resisted. The plaintiff's choice of forum should normally be respected.

It has become a common part of legal practice—even in cases that do not involve a forum non conveniens dispute—to fly tens of thousands of documents to distant locales, to send attorneys to the other end of the country for a day, to take videotape depositions, to conduct conference calls connecting half-a-dozen people thousands of miles apart. Geographic distance in today's would has less to do with the *Gilbert* conception of "convenience" and much more to do with simple economics. As the Court observed in *Manu International, S.A. v. Avon Products, Inc.*:

> The only obstacle to his [a Manu witness's] presence here is economic and Manu could be made provisionally responsible for this burden.
>
> * * *
>
> This is not a case where the defendant will be economically prejudiced by having to defend in the plaintiff's chosen forum rather than another.

Id., at 66.

* * *

> The doctrine of *forum non conveniens* is intended to avoid trial in inappropriate forums, not to avoid meritless suits. If this is such a suit, Avon can be protected by the trial judge's using his discretionary powers to force Manu, if it wants the testimony of Avon overseas representatives, to advance the expenses of bringing them here or counsel fees for taking their depositions abroad.

Id., at 68.

Even in 1947, there was an awareness that the location of evidence is reducible to a matter of economics and thus rendered insignificant. Dissenting in *Koster v. Lumbermens Mutual Casualty Co.*, *supra* at 537, Justice Reed stated:

> Since both documents and witnesses are beyond the jurisdiction of the chosen forum it will be the plaintiff's expense initially to transport such records and witnesses, an inconvenience which he has determined to bear,

> if it is true that he has no other source of proof. But even supposing that the defendant will have to transport documents and witnesses to meet the plaintiff's proof, a bare allegation to that effect is hardly a showing of such hardship as to make it proper to dismiss the case on the grounds of forum non conveniens.

Finally, a proper *forum non conveniens* dismissal is made to defeat "vexation" and "harassment" on the part of a plaintiff. *Piper Aircraft v. Reyno, supra* at 250 n.15; *Gulf Oil Corporation v. Gilbert, supra* at 508; *Koster v. Lumbermens, supra* at 524. In *Schertenleib v. Traum*, 589 F.2d 1156, 1164 (2d Cir. 1978), this Court noted the "somewhat unusual fact that it is the forum resident who seeks dismissal"; *accord, Manu International, S.A. v. Avon Products, Inc., supra* at 67. Other courts have stated that when a plaintiffs' choice of forum "cede[s] defendants the 'home turf' advantage . . . plaintiffs can hardly be said to 'vex,' 'harass' or 'oppress' defendants." *Phoenix Canada Oil Co., Ltd. v. Texaco, Inc.*, 78 F.R.D. 445, 453 (D. Del. 1978).

The Court below, in finding for defendant on every issue it considered, took a far too narrow and literalistic interpretation of the *forum non conveniens* law. A hint that the Courts' view of the law would be skewed came early in its decision: "This Court will approach the various concerns in the same direct manner in which *Piper* and *Gilbert* set them out." (App. at 28a). The Bhopal litigation, being vastly different from *Gilbert* and *Piper* and coming about 40 years after *Gilbert*, does not merit application of the "same concerns" in the "same direct manner."

For example, in its rigid review of private interest considerations, the district court ignored the very reason for their existence. The district court expected that India, in order to compensate for the relative lack of procedural techniques for consolidating cases or for bringing representative suits, would establish innovative procedures. [App. at 40a]. Obviously, the institution of new Indian procedures is not only highly speculative but would be far less convenient and more burdensome than relying on the proven American techniques for consolidation, class actions, or test cases. The Court dealt similarly with the problem of judicial delay in India. It assumed that India would come up with some procedure to speed the dilatory administration of Indian lawsuits. The district court considered itself "persuaded . . . that the most significant, urgent and extensive litigation ever to arise from a single event could be handled through judicial accommodation in India, if required." [App. at 40a]. Again, instead of proposing the solution that convenience dictates—holding the trial in the forum where there is the least delay—the court entertained a speculative and much more burdensome solution—that the forum beset by the longest delays institute some special procedure for the instant case.

Ignoring convenience considerations, the District Court also dismissed the case under the condition that the defendant observe American federal rules for discovery. Thus, the Court created a situation in which an Indian court would either apply discovery rules with which it is totally unfamiliar and probably antagonistic or in which all discovery motions in the Indian case would be filed with the District Court in New York. In either situation, the efficiency and con-

venience that are the underlying purposes of the *forum non conveniens* doctrine would be flouted. There are numerous additional instances where the District Court recognized and applied the factors set out in *Gilbert* but totally lost sight of their central purpose of promoting efficiency, expeditiousness, and convenience.

Plaintiffs' preference for a more efficient system, one that affords jury trials, and that typically awards greater damages could not be construed to be a form of oppression or harassment. While Plaintiffs are entitled to *choose* a forum for strategic reasons, strategic motives of a defendant—*i.e.* a preference for delays and lower damage awards—are inappropriate for a *forum non conveniens* motion; while the aggrieved party's choice of forum, as discussed below, is entitled to deference, a defendant's *forum non conveniens* motion must be founded upon the principles underlying the *forum non conveniens* doctrine. As succinctly stated in *Pain v. United Technologies Corporation*, 637 F.2d 775, 783 (D.C. Cir. 1980), "... *forum non conveniens* was never designed to permit forum shopping by defendants." Because plaintiffs' filing in the United States has nothing to do with harassment and defendant is therefore not trying to escape harassment, its forum non conveniens motion is unprincipled and should have been dismissed.

The district court, in applying the *Gilbert* considerations in "the same direct manner" that *Gilbert* set them out, also failed to consider the revolutionary advances in transportation and communication. It is particularly important in the instant case to view the location of evidence as a matter of economics. In this case, the costs of transporting documents or wit-

nesses or taking videotape depositions in India are miniscule compared to the amount of money involved. The Individual Plaintiffs and the defendant already agreed upon a settlement of $350 million. All the parties are capable of—and indeed will—commit millions of dollars to the prosecution of their cases. The district court failed to recognize that, in a lawsuit of this magnitude, the location of evidence and the cost of its being transported are insignificant. The cost factor has even less importance when one considers that evidence will have to be transported no matter which forum hears the case.

The appellate court's affirmance merely compounded the errors of the district court. It adopted the view of the district court and, further, appeared to assume that the Indian Government represented all of the plaintiffs, even though no decision on the issue of representation had ever been reached.

For these reasons, this Court should grant certiorari to correct the clear imbalance in the lower court's view on *forum non conveniens*.

III. The District Court And Court Of Appeals Court Should Have Ordered An Initial Hearing With Respect To The $350 Million Settlement

On March 19, 1986, two members of Plaintiffs' Executive Committee informed the Court that plaintiffs, excluding the Government of India, had reached a settlement with UCC. Subsequently, they requested the Court to hold an initial settlement hearing regarding the fairness of the settlement. The settlement called for payments totalling $350 million to be paid over a period of years and represented one of the largest cash settlements of all time. Equally important was the fact that Indian citizens would quickly receive

compensation for the horrifying gas leak incident. Notwithstanding the largesse of the settlement, the District Court refused to hold a preliminary settlement hearing as required by the courts interpreting Rule 23(e).

The parties need only initially demonstrate to the Court that a proposed class-wide settlement is within the range of fairness and reasonableness. See, *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). If the district court finds that the settlement proposal is within that range, the court proceeds to the second step, the final settlement hearing. *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305 (7th Cir. 1980). In the instant case, the District Court refused to hold a hearing to determine whether the class settlement was within the range of fairness and reasonableness. Even assuming that the parties demonstrated that the settlement met the first threshhold, plaintiffs through their individual counsel maintained the right to file objections at the final fairness hearing with respect to the adequacy of the settlement. Judge Keenan presumably believed that because the proposed settlement did not receive the endorsement of the State of India it could not be approved under any circumstances. However, class-wide settlements can be approved as long as they are ultimately found to be "fair, reasonable and adequate."

The district court, at a minimum, should have made more than a surface inquiry into the possibility of a settlement and, therefore, this Court should grant certiorari to determine whether a settlement hearing was appropriate.

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CONCLUSION

The doctrine of *forum non conveniens* is a judicially engrafted exception to the statutory jurisdiction of the federal courts. It should be used only sparingly. Here, the district court and court of appeals ignored glaring deficiencies in the Indian legal system which, if allowed to stand, will subject the Plaintiffs to decades of litigation. In addition, both courts relied upon a wooden application of this Court's prior *forum non conveniens* decisions, and thereby ignored vast changes in litigation management and technology. Finally, the Courts failed to hold a fairness hearing with regard to the proposed settlement. This Court should grant Certiorari to correct these errors.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 301, 383, 496—August Term, 1986

(Argued: November 24, 1986

Decided: January 14, 1987)

Docket Nos. 86-7517, 86-7589, 86-7637

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984.

THE PLAINTIFFS in all cases which have been consolidated into this proceeding by order of the Judicial Panel on Multidistrict Litigation dated February 6, 1985, and Order of this Court dated April 25, 1985, together with those Plaintiffs in all other related actions which may be consolidated subsequent to the filing of this notice of appeal, including but not limited to all those cases which are all those tort cases filed in this Court which the undersigned are aware of, except *The Union of India v. Union Carbide Corporation*, No. 85 Civ. 2696 and except those cases consolidated as shareholders or derivative cases by EXECUTIVE COMMITTEE

MEMBERS, STANLEY M. CHESLEY and F. LEE BAILEY, and THE UNION OF INDIA,

Plaintiffs-Appellants, Cross-Appellees,

— against —

UNION CARBIDE CORPORATION,

Defendant-Appellee, Cross-Appellant.

Before:

MANSFIELD, PRATT and ALTIMARI,

Circuit Judges.

Appeal by individual plaintiffs in some 145 consolidated personal injury actions arising out of the disaster caused by leakage of lethal gas from a chemical plant in Bhopal, India, from an order of the Southern District of New York, John F. Keenan, *Judge*, dismissing their actions on grounds of *forum non conveniens*, subject to certain conditions. Cross appeals by Union Carbide Corporation and the Union of India.

Order of dismissal modified and in all other respects affirmed.

STANLEY M. CHESLEY, Cincinnati, OH, (Waite Schneider, Bayless and Chesley

Co., L.P.A., Cincinnati, OH.
— and —
F. LEE BAILEY, New York, NY (Jack S. Hoffinger (Liaison Counsel), Hoffinger, Friedland, Dobrish, Bernfeld and Hasen, New York, NY, of counsel; On the brief: Phillip B. Allen, Arnold Levin, David J. Perlman, Howard J. Sedran, Michael C. Zwal), *for Appellant Individual Plaintiffs.*

BUD G. HOLMAN, New York, NY (William Krohley, Robert E. Crotty, Lisa E. Cleary, Kelley Drye and Warren, New York, NY of counsel), *for Union Carbide Corporation.*

MICHAEL V. CIRESI, Minneapolis, MN (Bruce A. Finzen, Robert M. Wattson, Roberta B. Walburn, Robins, Zelle, Larson & Kaplan, Minneapolis, MN; (D.S. Sastri, Silver Springs, MD); Gerald A. Novack, Barrett, Smith, Schapiro, Simon & Armstrong, New York, NY, of counsel), *for The Union of India.*

ROB HAGER, Washington, DC *for Amicus Curiae Christic Institute.*

MANSFIELD, *Circuit Judge*:*

This appeal raises the question of whether thousands of claims by citizens of India and the Government of India

*Judge Mansfield prepared this opinion prior to his death on January 7, 1987. Except for minor nonsubstantive, editorial changes, it reflects his work, concurred in by the other members of the panel.

arising out of the most devastating industrial disaster in history—the deaths of over 2,000 persons and injuries of over 200,000 caused by lethal gas known as methyl isocyanate which was released from a chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India —should be tried in the United States or in India. The Southern District of New York, John F. Keenan, *Judge*, granted the motion of Union Carbide Corporation (UCC), a defendant in some 145 actions commenced in federal courts in the United States, to dismiss these actions on grounds of *forum non conveniens* so that the claims may be tried in India, subject to certain conditions. The individual plaintiffs appeal from the order and the court's denial of their motion for a fairness hearing on a proposed settlement. UCC and the Union of India (UOI), a plaintiff, cross-appeal. We eliminate two of the conditions imposed by the district court and in all other respects affirm that court's orders.

The accident occurred on the night of December 2-3, 1984, when winds blew the deadly gas from the plant operated by UCIL into densely occupied parts of the city of Bhopal. UCIL is incorporated under the laws of India. Fifty and nine-tenths percent of its stock is owned by UCC, 22% is owned or controlled by the government of India, and the balance is held by approximately 23,500 Indian citizens. The stock is publicly traded on the Bombay Stock Exchange. The company is engaged in the manufacture of a variety of products, including chemicals, plastics, fertilizers and insecticides, at 14 plants in India and employs over 9,000 Indian citizens. It is managed and operated entirely by Indians in India.

Four days after the Bhopal accident, on December 7, 1984, the first of some 145 purported class actions in fed-

eral district courts in the United States was commenced on behalf of victims of the disaster. On January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned the actions to the Southern District of New York where they became the subject of a consolidated complaint filed on June 28, 1985.

In the meantime, on March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, granting to its government, the UOI, the exclusive right to represent the victims in India or elsewhere. Thereupon the UOI, purporting to act in the capacity of *parens patriae*, and with retainers executed by many of the victims, on April 8, 1985, filed a complaint in the Southern District of New York on behalf of all victims of the Bhopal disaster, similar to the purported class action complaints already filed by individuals in the United States. The UOI's decision to bring suit in the United States was attributed to the fact that, although numerous lawsuits (by now, some 6,500) had been instituted by victims in India against UCIL, the Indian courts did not have jurisdiction over UCC, the parent company, which is a defendant in the United States actions. The actions in India asserted claims not only against UCIL but also against the UOI, the State of Madhya Pradesh, and the Municipality of Bhopal, and were consolidated in the District Court of Bhopal.

By order dated April 25, 1985, Judge Keenan appointed a three-person Executive Committee to represent all plaintiffs in the pre-trial proceedings. It consisted of two lawyers representing the individual plaintiffs and one representing the UOI. On July 31, 1985, UCC moved to dismiss the complaints on grounds of *forum non conveniens*, the plaintiffs' lack of standing to bring the actions in the

United States, and their purported attorneys' lack of authority to represent them. After several months of discovery related to *forum non conveniens*,[1] the individual plaintiffs and the UOI opposed UCC's motion. After hearing argument on January 3, 1986, the district court, on May 12, 1986, in a thoroughly reasoned 63-page opinion granted the motion, dismissing the lawsuits before it on condition that UCC:

> (1) consent to the jurisdiction of the courts of India and continue to waive defenses based on the statute of limitations,
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> (2) agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance "comport with minimal requirements of due process," and
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> (3) be subject to discovery under the Federal Rules of Civil Procedure of the United States.

On June 12, 1986, UCC accepted these conditions subject to its right to appeal them; and on June 24, 1986, the district court entered its order of dismissal. In September 1986 the UOI, acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants against UCC and UCIL in the District Court of Bhopal, where many individual suits by victims of the disaster were then pending.

In its opinion dismissing the actions the district court analyzed the *forum non conveniens* issues, applying the

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[1]UCC briefed only the dispositive issue of *forum non conveniens* before the district court and suggested that the other two grounds for its motion need not be considered. Discovery was therefore limited to the issue of *forum non conveniens*; and the district court based its dismissal solely on that doctrine.

standards and weighing the factors suggested by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). At the outset Judge Keenan concluded, in accordance with the Court's expressed views in *Piper* that, since the plaintiffs were not residents of the United States but of a foreign country, their choice of the United States as a forum would not be given the deference to which it would be entitled if this country were their home. *See Piper*, 454 U.S. at 256. Following the dictates of *Piper*, the district court declined to compare the advantages and disadvantages to the respective parties of American versus Indian Laws or to determine the impact upon plaintiffs' claims of the laws of India, where UCC had acknowledged that it would make itself amenable to process, except to ascertain whether India provided an adequate alternative forum, as distinguished from no remedy at all. Judge Keenan reviewed thoroughly the affidavits of experts on India's law and legal system, which described in detail its procedural and substantive aspects, and concluded that, despite some of the Indian system's disadvantages, it afforded an adequate alternative forum for the enforcement of plaintiffs' claims.

The Indian judiciary was found by the court to be a developed, independent and progressive one, which has demonstrated its capability of circumventing long delays and backlogs prevalent in the Indian courts' handling of ordinary cases by devising special expediting procedures in extraordinary cases, such as by directing its High Court to hear them on a daily basis, appointing special tribunals to handle them, and assigning daily hearing duties to a single judge. He found that Indian courts have competently dealt with complex technological issues. Since the Bhopal Act provides that the case may be treated speed-

ily, effectively and to the best advantage of the claimants, and since the Union of India represents the claimants, the prosecution of the claims is expected to be adequately staffed by the Attorney General or Solicitor General of India.

The tort law of India, which is derived from common law and British precedent, was found to be suitable for resolution of legal issues arising in cases involving highly complex technology. Moreover, Indian courts would be in a superior position to construe and apply applicable Indian laws and standards than would courts of the United States. Third parties may be interpleaded under Order 1, Rule 10(2) of the Indian Code of Civil Procedure, and defendants may seek contribution from third parties. The absence in India of a class action procedure comparable to that in federal courts here was found not to deprive the plaintiffs of a remedy, in view of existing Indian legal authorization for "representative" suits under Order 1, Rule 8 of the Indian Code of Civil Procedure, which would permit an Indian court to create representative classes. Judge Keenan further found that the absence of juries and contingent fee arrangements in India would not deprive the claimants of an adequate remedy.

In two areas bearing upon the adequacy of the Indian forum the district court decided to impose somewhat unusual conditions on the transfer of the American cases to India. One condition dealt with pre-trial discovery. Indian courts, following the British pattern, permit parties to have pre-trial discovery of each other through written interrogatories, liberal inspection of documents and requests for admission. Non-party witnesses can be interviewed and summoned to appear at trial or to produce documents. *See* India Code Civ. Proc., Order 16, Rule 6.

Witnesses unable to appear at trial are sometimes permitted to give evidence by means of affidavits. *See id.* Order 19. Discovery in India, however, as in Britain, is limited to evidence that may be admitted at trial. Litigants are not permitted to engage in wide-ranging discovery of the type authorized by Fed. R. Civ. P. 26(b), which allows inquiry into any unprivileged matter that could reasonably lead to the discovery of admissible evidence.

Judge Keenan, concluding that the Indian system might limit the victims' access to sources of proof, directed that dismissal of the actions on grounds of *forum non conveniens* must be conditioned on UCC's consent to discovery of it in accordance with the Federal Rules of Civil Procedure after the cases were transferred to India. He added, "While the Court feels that it would be fair to bind the plaintiffs to American discovery rules, too, it has no authority to do so."

Another condition imposed by the district court upon dismissal on grounds of *forum non conveniens* dealt with the enforceability in the United States of any judgment rendered by an Indian court in the cases. Judge Keenan, expressing the view that an Indian judgment might possibly not be enforceable in the United States, provided in his order that UCC must "agree to satisfy any judgment rendered by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimum requirements of due process."

As the district court found, the record shows that the private interests of the respective parties weigh heavily in favor of dismissal on grounds of *forum non conveniens.* The many witnesses and sources of proof are almost entirely located in India, where the accident occurred, and

could not be compelled to appear for trial in the United States. The Bhopal plant at the time of the accident was operated by some 193 Indian nationals, including the managers of seven operating units employed by the Agricultural Products Division of UCC, who reported to Indian Works Managers in Bhopal. The plant was maintained by seven functional departments employing over 200 more Indian nationals. UCIL kept at the plant daily, weekly and monthly records of plant operations and records of maintenance as well as records of the plant's Quality Control, Purchasing and Stores branches, all operated by Indian employees. The great majority of documents bearing on the design, safety, start-up and operation of the plant, as well as the safety training of the plant's employees, is located in India.[2] Proof to be offered at trial would be derived from interviews of these witnesses in India and study of the records located there to determine whether the accident was caused by negligence on the part of the management or employees in the operation of the plant, by fault in its design, or by sabotage. In short, India has greater ease of access to the proof than does the United States.

The plaintiffs seek to prove that the accident was caused by negligence on the part of UCC in originally contributing to the design of the plant and its provision for storage of excessive amounts of the gas at the plant. As Judge Keenan found, however, UCC's participation was

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[2]At oral argument UOI's counsel stated that UCC refused UOI's offer to furnish copies of some of the documents to UCC in the United States. The district court, on the other hand, found that following the disaster India's Central Bureau of Investigation seized, among other documents, daily, weekly and monthly records of the Bhopal plant operations. UCC states that of the 78,000 pages of documents seized, some 36,000 are plant operation records, of which 1,700 pages relate to plant maintenance in 1983 and 1984.

limited and its involvement in plant operations terminated long before the accident. Under 1973 agreements negotiated at arm's-length with UCIL, UCC did provide a summary "process design package" for construction of the plant and the services of some of its technicians to monitor the progress of UCIL in detailing the design and erecting the plant. However, the UOI controlled the terms of the agreements and precluded UCC from exercising any authority to "detail design, erect and commission the plant," which was done independently over the period from 1972 to 1980 by UCIL process design engineers who supervised, among many others, some 55 to 60 Indian engineers employed by the Bombay engineering firm of Humphreys and Glasgow. The preliminary process design information furnished by UCC could not have been used to construct the plant. Construction required the detailed process design and engineering data prepared by hundreds of Indian engineers, process designers and sub-contractors. During the ten years spent constructing the plant, its design and configuration underwent many changes.

The vital parts of the Bhopal plant, including its storage tank, monitoring instrumentation, and vent gas scrubber, were manufactured by Indians in India. Although some 40 UCIL employees were given some safety training at UCC's plant in West Virginia, they represented a small fraction of the Bhopal plant's employees. The vast majority of plant employees were selected and trained by UCIL in Bhopal. The manual for start-up of the Bhopal plant was prepared by Indians employed by UCIL.

In short, the plant has been constructed and managed by Indians in India. No Americans were employed at the plant at the time of the accident. In the five years from

1980 to 1984, although more than 1,000 Indians were employed at the plant, only one American was employed there and he left in 1982. No Americans visited the plant for more than one year prior to the accident, and during the 5-year period before the accident the communications between the plant and the United States were almost non-existent.

The vast majority of material witnesses and documentary proof bearing on causation of and liability for the accident is located in India, not the United States, and would be more accessible to an Indian court than to a United States court. The records are almost entirely in Hindi or other Indian languages, understandable to an Indian court without translation. The witnesses for the most part do not speak English but Indian languages understood by an Indian court but not by an American court. These witnesses could be required to appear in an Indian court but not in a court of the United States. Although witnesses in the United States could not be subpoenaed to appear in India, they are comparatively few in number and most are employed by UCC which, as a party, would produce them in India, with lower overall transportation costs than if the parties were to attempt to bring hundreds of Indian witnesses to the United States. Lastly, Judge Keenan properly concluded that an Indian court would be in a better position to direct and supervise a viewing of the Bhopal plant, which was sealed after the accident. Such a viewing could be of help to a court in determining liability issues.

After a thorough review, the district court concluded that the public interest concerns, like the private ones, also weigh heavily in favor of India as the situs for trial and disposition of the cases. The accident and all relevant

events occurred in India. The victims, over 200,000 in number, are citizens of India and located there. The witnesses are almost entirely Indian citizens. The Union of India has a greater interest than does the United States in facilitating the trial and adjudication of the victims' claims. Despite the contentions of plaintiffs and amici that it would be in the public interest to avoid a "double standard" by requiring an American parent corporation (UCC) to submit to the jurisdiction of American courts, India has a stronger countervailing interest in adjudicating the claims in its courts according to its standards rather than having American values and standards of care imposed upon it.

India's interest is increased by the fact that it has for years treated UCIL as an Indian national, subjecting it to intensive regulations and governmental supervision of the construction, development and operation of the Bhopal plant, its emissions, water and air pollution, and safety precautions. Numerous Indian government officials have regularly conducted on-site inspections of the plant and approved its machinery and equipment, including its facilities for storage of the lethal methyl isocyanate gas that escaped and caused the disaster giving rise to the claims. Thus India has considered the plant to be an Indian one and the disaster to be an Indian problem. It therefore has a deep interest in ensuring compliance with its safety standards. Moreover, plaintiffs have conceded that in view of India's strong interest and its greater contacts with the plant, its operations, its employees, and the victims of the accident, the law of India, as the place where the tort occurred, will undoubtedly govern. In contrast, the American interests are relatively minor. Indeed, a long trial of the 145 cases here would unduly burden an already overburdened court, involving both jury hardship

and heavy expense. It would face the court with numerous practical difficulties, including the almost impossible task of attempting to understand extensive relevant Indian regulations published in a foreign language and the slow process of receiving testimony of scores of witnesses through interpreters.

Having made the foregoing findings, Judge Keenan dismissed the actions against UCC on grounds of *forum non conveniens* upon the conditions indicated above, after obtaining UCC's consent to those conditions subject to its right to appeal the order. After the plaintiffs filed their notice of appeal, UCC and the Union of India filed cross appeals.

Upon these appeals, the plaintiffs continue to oppose the dismissal. The Union of India, however, has changed its position and now supports the district court's order. UCC, as it did in the district court, opposes as unfair the condition that it submit to discovery pursuant to the Federal Rules of Civil Procedure without reciprocally obligating the plaintiffs and Union of India to be subject to discovery on the same basis so that both sides might be treated equally, giving each the same access to the facts in the others' possession.

Upon argument of the appeal, UCC also took the position that the district court's order requiring it to satisfy any Indian court judgment was unfair unless some method were provided, such as continued availability of the district court as a forum, to ensure that any denial of due process by the Indian courts could be remedied promptly by the federal court here rather than delay resolution of the issue until termination of the Indian court proceedings and appeal, which might take several years. UCC's argument in this respect was based on the sudden

issuance by the Indian court in Bhopal of a temporary order freezing all of UCC's assets, which could have caused it irreparable injury if it had been continued indefinitely,[3] and by the conflict of interest posed by the UOI's position in the Indian courts where, since the UOI would appear both as a plaintiff and a defendant, it might as a plaintiff voluntarily dismiss its claims against itself as a defendant or, as a co-defendant with UCC, be tempted to shed all blame upon UCC even though the UOI had in fact been responsible for supervision, regulation and safety of UCIL's Bhopal plant.

DISCUSSION

The standard to be applied in reviewing the district court's *forum non conveniens* dismissal was clearly expressed by the Supreme Court in *Piper Aircraft Co. v. Reyno, supra.* 454 U.S. at 257, as follows:

> "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."

Having reviewed Judge Keenan's detailed decision, in which he thoroughly considered the comparative adequacy of the forums and the public and private interests involved, we are satisfied that there was no abuse of discretion in his granting dismissal of the action. On the contrary, it might reasonably be concluded that it would have

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[3]The Indian court's temporary restraining order has since been dissolved upon UCC's agreement to maintain sufficient assets to satisfy a judgment rendered against it in India.

been an abuse of discretion to deny a *forum non conveniens* dismissal. *See Schertenleib v. Traum*, 589 F.2d 1156, 1164 (2d Cir. 1978); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir. 1983) (per curiam). Practically all relevant factors demonstrate that transfer of the cases to India for trial and adjudication is both fair and just to the parties.

Plaintiffs' principal contentions in favor of retention of the cases by the district court are that deference to the plaintiffs' choice of forum has been inadequate, that the Indian courts are insufficiently equipped for the task, that UCC has its principal place of business here, that the most probative evidence regarding negligence and causation is to be found here, that federal courts are much better equipped through experience and procedures to handle such complex actions efficiently than are Indian courts, and that a transfer of the cases to India will jeopardize a $350 million settlement being negotiated by plaintiffs' counsel. All of these arguments, however, must be rejected.

Little or no deference can be paid to the plaintiffs' choice of a United States forum when all but a few of the 200,000 plaintiffs are Indian citizens located in India who, according to the UOI, have revoked the authorizations of American counsel to represent them here and have substituted the UOI, which now prefers Indian courts. The finding of our district court, after exhaustive analysis of the evidence, that the Indian courts provide a reasonably adequate alternative forum cannot be labelled clearly erroneous or an abuse of discretion.

The emphasis placed by plaintiffs on UCC's having its domicile here, where personal jurisdiction over it exists, is robbed of significance by its consent to Indian jurisdic-

tion. Plaintiffs' contention that the most crucial and probative evidence is located in the United States is simply not in accord with the record or the district court's findings. Although basic design programs were prepared in the United States and some assistance furnished to UCIL at the outset of the 10-year period during which the Bhopal plant was constructed, the proof bearing on the issues to be tried is almost entirely located in India. This includes the principal witnesses and documents bearing on the development and construction of the plant, the detailed designs, the implementation of plans, the operation and regulation of the plant, its safety precautions, the facts with respect to the accident itself, and the deaths and injuries attributable to the accident.

Although the plaintiffs' American counsel may at one time have been close to reaching a $350 million settlement of the cases, no such settlement was ever finalized. No draft joint stipulation in writing or settlement agreement appears to have been prepared, much less approved by the parties. No petition for certification of a settlement class under Fed. R. Civ. P. 23 has ever been presented. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). Most important, the UOI, which is itself a plaintiff and states that it now represents the Indian plaintiffs formerly represented by American counsel, is firmly opposed to the $350 million "settlement" as inadequate. Under these circumstances, to order a Rule 23 "fairness" hearing would be futile. The district court's denial of the American counsels' motion for such a hearing must accordingly be affirmed.

The conditions imposed by the district court upon its *forum non conveniens* dismissal stand on a different footing. Plaintiffs and the UOI, however, contend that UCC,

having been granted the *forum non conveniens* dismissal that it sought and having consented to the district court's order, has waived its right to appellate review of these conditions. We disagree. UCC expressly reserved its right to appeal Judge Keenan's order. Moreover, it has made a sufficient showing of prejudice from the second and third conditions of the court's order to entitle it to seek appellate review. UCC's position is comparable to that of a prevailing party which, upon being granted injunctive relief, is permitted to challenge by appeal conditions attaching to the injunction that are found to be objectionable. *United States v. Bedford Assocs.*, 618 F.2d 904, 913-16 (2d Cir. 1980). Similarly, conditions imposed by the court upon dismissals without prejudice under Fed. R. Civ. P. 41(a)(2) may be appealed by the plaintiff when they prejudice the plaintiff. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976).

All three conditions of the dismissal are reviewable since plaintiffs have appealed the district court's order and UCC has cross-appealed "from each judgment and order appealed in whole or part by any plaintiff." We therefore have jurisdiction over the entire case and may in the interests of justice modify the district court's order. *Cf. In re Barnett*, 124 F.2d 1005, 1009 (2d Cir. 1942) ("We are clear that we have the power to order a reversal as to [parties in interest] even though they did not appeal."); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir. 1977) ("Once a timely notice of appeal has been filed from a judgment, it gives us jurisdiction to review the entire judgment; rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require.") (citing *In re Barnett, supra*).

The first condition, that UCC consent to the Indian court's personal jurisdiction over it and waive the statute of limitations as a defense, are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition. *See, e.g., Schertenleib, supra,* 589 F.2d at 1166; *Bailey v. Dolphin Int'l, Inc.,* 697 F.2d 1268, 1280 (5th Cir. 1983). The remaining two conditions, however, pose problems.

In requiring that UCC consent to enforceability of an Indian judgment against it, the district court proceeded at least in part on the erroneous assumption that, absent such a requirement, the plaintiffs, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary. Under New York law, which governs actions brought in New York to enforce foreign judgments, *see Island Territory of Curacao v. Solitron Devices, Inc.,* 489 F.2d 1313, 1318 (2d Cir. 1973), *cert. denied,* 416 U.S. 986 (1974), a foreign-country judgment that is final, conclusive and enforceable where rendered must be recognized and will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" except that it is not deemed to be conclusive if:

> "1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
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> "2. the foreign court did not have personal jurisdiction over the defendant."

Art. 53, Recognition of Foreign Country Money Judg-

ments, 7B N.Y. Civ. Prac. L. & R. §§ 5301-09 (McKinney 1978). Although § 5304 further provides that under certain specified conditions a foreign country judgment need not be recognized,[4] none of these conditions would apply to the present cases except for the possibility of failure to provide UCC with sufficient notice of proceedings or the existence of fraud in obtaining the judgment, which do not presently exist but conceivably could occur in the future.[5]

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[4]Section 5304 provides in pertinent part:

"(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."

[5]New York's article 53 is based upon the Uniform Foreign Money-Judgments Recognition Act, *see* 13 U.L.A. 263 (1962), which has been adopted by 15 states in addition to New York. In states that have not adopted the Uniform Foreign Money-Judgments Recognition Act, foreign judgments may be recognized according to principles of comity. *See Hilton v. Guyot*, 159 U.S. 113 (1895).

UCC, as a New York business corporation, would be subject to personal jurisdiction in a court sitting in New York. An Indian money judgment could be enforced against UCC in New York by means of either an action

UCC contends that Indian courts, while providing an adequate alternative forum, do not observe due process standards that would be required as a matter of course in this country. As evidence of this apprehension it points to the haste with which the Indian court in Bhopal issued a temporary order freezing its assets throughout the world and the possibility of serious prejudice to it if the UOI is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings. It argues that we should protect it against such denial of due process by authorizing Judge Keenan to retain the authority, after *forum non conveniens* dismissal of the cases here, to monitor the Indian court proceedings and be available on call to rectify in some undefined way any abuses of UCC's right to due process as they might occur in India.

UCC's proposed remedy is not only impractical but evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous. The district court's jurisdiction is limited to proceedings before it in this country. Once it dismisses those proceedings on grounds of *forum non conveniens* it ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to enforce here a final and conclusive Indian money judgment. Nor could we, even if we attempted to retain some sort of supervisory jurisdiction, impose our due process requirements upon Indian courts, which are governed by their laws, not

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on the judgment or a motion for summary judgment in lieu of complaint. *See* 7B N.Y. Civ. Prac. L. & R. § 5303. In either case, once converted into a New York judgment, the judgment would be enforcible as a New York judgment, and thus entitled to the full faith and credit of New York's sister states.

ours. The concept of shared jurisdictions is both illusory and unrealistic. The parties cannot simultaneously submit to both jurisdictions the resolution of the pre-trial and trial issues when there is only one consolidated case pending in one court. Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country.

We are concerned, however, that as it is written the district court's requirement that UCC consent to the enforcement of a final Indian judgment, which was imposed on the erroneous assumption that such a judgment might not otherwise be enforceable in the United States, may create misunderstandings and problems of construction. Although the order's provision that the judgment "comport with *minimal* requirements of due process" (emphasis supplied) probably is intended to refer to "due process" as used in the New York Foreign Country Money Judgments Law and others like it, there is the risk that it may also be interpreted as providing for a lesser standard than we would otherwise require. Since the court's condition with respect to enforceability of any final Indian judgment is predicated on an erroneous legal assumption and its "due process" language is ambiguous, and since the district court's purpose is fully served by New York's statute providing for recognition of foreign-country money judgments, it was error to impose this condition upon the parties.

We also believe that the district court erred in requiring UCC to consent (which UCC did under protest and subject to its right of appeal) to broad discovery of it by the plaintiffs under the Federal Rules of Civil Procedure when UCC is confined to the more limited discovery

authorized under Indian law. We recognize that under some circumstances, such as when a moving defendant unconditionally consents thereto or no undiscovered evidence of consequence is believed to be under the control of a plaintiff or co-defendant, it may be appropriate to condition a *forum non conveniens* dismissal on the moving defendant's submission to discovery under the Federal Rules without requiring reciprocal discovery by it of the plaintiff. *See, e.g., Piper Aircraft v. Reyno, supra,* 454 U.S. at 257 n.25 (suggesting that district courts can condition dismissal upon a defendant's agreeing to provide all relevant records); *Ali v. Offshore Co.*, 753 F.2d 1327, 1334 n.16 (5th Cir. 1985) (same); *Boskoff v. Transportes Aereos Portugueses,* 17 Av. Cas. (CCH) 18,613, at 18,616 (N.D. Ill. 1983) (accepting defendant's voluntary commitment to provide discovery in foreign forum according to Federal Rules). Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Application of this fundamental principle in the present case is especially appropriate since the UOI, as the sovereign government of India, is expected to be a party to the Indian litigation, possibly on both sides.

For these reasons we direct that the condition with respect to the discovery of UCC under the Federal Rules of Civil Procedure be deleted without prejudice to the right of the parties to have reciprocal discovery of each other on equal terms under the Federal Rules, subject to such approval as may be required of the Indian court in which the case will be pending. If, for instance, Indian authorities will permit mutual discovery pursuant to the Federal Rules, the district court's order, as modified in accordance with this opinion, should not be construed to bar such procedure. In the absence of such a court-

sanctioned agreement, however, the parties will be limited by the applicable discovery rules of the Indiana court in which the claims will be pending.

As so modified the district court's order is affirmed.

IN RE UNION CARBIDE CORPORATION
GAS PLANT DISASTER AT BHOPAL,
INDIA IN DECEMBER, 1984.

Misc. No. 21-38 (JFK).

United States District Court,
S.D. New York.

May 12, 1986.

As Amended June 10, 1986.

OPINION and ORDER

KEENAN, District Judge:

FACTUAL BACKGROUND

On the night of December 2-3, 1984 the most tragic industrial disaster in history occurred in the city of Bhopal, state of Madhya Pradesh, Union of India. Located there was a chemical plant owned and operated by Union Carbide India Limited ("UCIL"). The plant, situated in the northern sector of the city, had numerous hutments adjacent to it on its southern side which were occupied by impoverished squatters. UCIL manufactured the pesticides Sevin and Temik at the Bhopal plant at the request of, and with the approval of, the Government of India. (Affidavit of John MacDonald ("MacDonald Aff.") at 2). UCIL was incorporated under Indian law in 1934. 50.9% of its stock is owned by the defendant, Union Carbide Corporation, a New York corporation. (MacDonald Aff. at 1). Methyl isocyanate (MIC), a highly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the plant in substantial quantities for reasons not yet determined.

The prevailing winds on the early morning of December 3, 1984 were from Northwest to Southeast. They blew the deadly gas into the overpopulated hutments adjacent to

the plant and into the most densely occupied parts of the city. The results were horrendous. Estimates of deaths directly attributable to the leak range as high as 2,100. No one is sure exactly how many perished. Over 200,000 people suffered injuries—some serious and permanent—some mild and temporary. Livestock were killed and crops damaged. Businesses were interrupted.

On December 7, 1984 the first lawsuit was filed by American lawyers in the United States on behalf of thousands of Indians. *Dawani et al. v. Union Carbide Corp.*, S.D.W.Va. (84-2479). Since then 144 additional actions have been commenced in federal courts in the United States. The actions have all been joined and assigned by the Judicial Panel on Multidistrict Litigation to the Southern District of New York by order of February 6, 1985, 601 F.Supp. 1035.

The individual federal court complaints have been superseded by a consolidated complaint filed on June 28, 1985.

The Indian Government on March 29, 1985 enacted legislation, the Bhopal Gas Leak Disaster (Processing of Claims) Act (21 of 1985) ("Bhopal Act"), providing that the Government of India has the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy. Pursuant to the Bhopal Act, the Union of India, on April 8, 1985, filed a complaint with this Court setting forth claims for relief similar to those in the consolidated complaint of June 28, 1985.

By order of April 25, 1985 this Court established a Plaintiffs' Executive Committee, comprised of F. Lee Bailey and Stanley M. Chesley, Esqs., who represented individual plaintiffs and Michael V. Ciresi Esq., whose firm represents the Union of India. Jack S. Hoffinger, Esq.,

who represents individual plaintiffs, was appointed liaison counsel for the Plaintiffs' Executive Committee.[1]

On September 24, 1985, pursuant to the Bhopal Act, the Central Government of India framed a "scheme" for the Registration and Processing of Claims arising out of the disaster. According to the Union of India's counsel, over 487,000 claims have been filed in India pursuant to the "scheme."

There presently are 145 actions filed in the United States District Court for the Southern District of New York under the Judicial Panel for Multidistrict Litigation's order of February 6, 1985, involving approximately 200,000 plaintiffs.

Before this Court is a motion by the defendant Union Carbide Corporation ("Union Carbide") to dismiss the consolidated action on the grounds of *forum non conveniens.*

DISCUSSION

The doctrine of *forum non conveniens* allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute. In support of its position that the consolidated action before the Court should be transferred to a more convenient forum within the Union of India pursuant to this doctrine, Union Carbide relies on the

[1] All counsel on the Plaintiffs' Executive committee were most professional and helpful to the Court in this case. Mr. Hoffinger agreed to proceed *pro bono* in this case, and waived any possible fee. The Court has been informed that neither Mr. Hoffinger, nor anyone else on the Plaintiffs' Executive Committee, nor anyone in their law firms went to India on the days immediately following the tragedy to "sign up" Indian plaintiffs. The behavior of many American lawyers who went to Bhopal, India during December 1984 and January 1985 is not before this Court on this motion. Suffice it to say that those members of the American bar who travelled the 8,200 miles to Bhopal in those months did little to better the American image in the Third World—or anywhere else. None of them were on the Plaintiffs' Executive Committee.

United States Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). The plaintiffs cite numerous other lower United States federal court cases in their briefs and seek to distinguish the Supreme Court's decisions from this case. Of course, *Gilbert* and *Piper* are the touchstones in sorting out and examining the contentions of both sides to this motion on the various factors bearing on convenience.

Piper teaches a straightforward formulation of the doctrine of *forum non conveniens.* A district court is advised to determine first whether the proposed alternative forum is "adequate." This inquiry should proceed in the order followed below. Then, as a matter within its "sound discretion," *Piper* at 257, 102 S.Ct. at 266, the district court should consider relevant public and private interest factors, and reasonably balance those factors, in order to determine whether dismissal is favored. This Court will approach the various concerns in the same direct manner in which *Piper* and *Gilbert* set them out.

At this juncture, it would be appropriate to discuss the presumptions on a *forum non conveniens* motion. In *Piper,* the Court discussed its earlier finding in *Koster v. Lumbermens Mutual Casualty Co.,* 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947), which suggested that a plaintiff's choice of forum was entitled to great deference when the forum chosen was the home of the plaintiff. This presumption was based on the fact that the choice of the home forum indicated a reasonable assumption that the choice was convenient. *Koster* at 524, 67 S.Ct. at 831. Conversely, the *Piper* Court found:

> When the plaintiff is foreign, however, this assumption is mush less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure

> that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Piper 454 U.S. at 256, 102 S.Ct. at 266 (footnote omitted).

In the case now before the Court, in which the plaintiffs, including the Union of India, are foreign, and share a home forum which is not the instant forum, the assumption that this forum is convenient is not completely reasonable. The foreign plaintiffs' choice of the United States forum "deserves less deference" than would be accorded a United States citizen's choice. This Court will apply the presumption in favor of plaintiffs' choice of forum with "less than maximum force." *Piper* at 261, 102 S.Ct. at 268. *See* note 23 at 864, *infra.*

1. Preliminary Considerations.

"At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Piper* at 254, n. 22, 102 S.Ct. at 265, n. 22. The elements of that inquiry are set forth in *Piper.* First, the Court said, "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper* at 254, n. 22, 102 S.Ct. at 265, n. 22, quoting *Gilbert* 330 U.S. at 506-507, 67 S.Ct. at 842. *Gilbert* states that the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process."

Extending the limited inquiry of *Gilbert,* the *Piper* Court delved into the relevance of the substantive and procedural differences in law which would be applied in the event a case was transferred on the grounds of *forum non conveniens.* The *Piper* Court determined that it was theoretically inconsistent with the underlying doctrine of *forum non conveniens,* as well as grossly impractical, to consider the impact of the putative transferee forum's law on the plaintiff in its decision on a *forum non conveniens* motion: "[I]f conclusive or substantial weight were given to the

possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless." *Piper* 454 U.S. at 250, 102 S.Ct. at 263.[2]

The Court listed numerous practical considerations which led to its conclusion that an unfavorable change in law for plaintiff was not a relevant factor in the forum analysis. First, the Court observed that if the chance of a change in law were given substantial weight, choice of law questions would "become extremely important." *Piper* at 251, 102 S.Ct. at 263. U.S. courts would "have to compare the rights, remedies, and procedures available" within the two proposed alternative forums, to determine whether a disadvantageous change in law would occur upon transfer. *Id.* Since "[t]he doctrine of *forum non conveniens,* however, is designed in part to help courts avoid conducting complex exercises in comparative law," the change in law analysis would subvert the doctrine itself. *Id.* Thus, a court engaged in the inquiry regarding the existence and adequacy of an alternative forum should not hinge its decision on an unfavorable change in law.[3]

Another practical concern relating to the "change in law" inquiry was discussed by the *Piper* court. Based on the liberality of United States federal law as compared to much foreign law with respect to availability of strict liability for tort, malleable and diverse choice of law rules among the 50 states, availability of jury trials, contingent fee arrangements and extensive discovery provisions, the

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[2] The Court found a theoretical flaw in the opposite rule, as set forth by the Third Circuit. Noting that a plaintiff would choose the forum with the most favorable choice of law rules in the first instance, "if the possibility of an unfavorable change in substantive law is given weight in the *forum non conveniens* inquiry, dismissal would rarely be proper." *Piper* at 250, 102 S.Ct. at 263.

[3] Similarly, the Court determined that "the possibility of a change in law favorable to defendant should be not considered." *Piper* at 252, n. 19, 102 S.Ct. at 264, n. 19.

Court observed that a change of forum might frequently involve an unfavorable change of law for foreign plaintiffs suing American defendants. *Piper* at 252, n. 18, 102 S.Ct. at 264, n. 18. Consequently, if the unfavorable change in law were a major factor in the analysis:

> [T]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

Piper at 252, 102 S.Ct. at 264 (footnotes omitted).

At the point, however, where the possible change in law would provide "no remedy at all" to plaintiff, a court may conclude that no adequate alternative exists. As the *Piper* Court observed, it did not hold that:

> [T]he possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Piper at 254, 102 S.Ct. at 265 (emphasis in original)(footnote omitted). Thus, while it is not a "major factor" in the analysis, a court must at least consider the effect on plaintiffs of a change in law upon transfer.

To a great extent, the plaintiffs in this case argue that Indian courts do not offer an adequate forum for this litigation by virtue of the relative "procedural and discovery deficiencies [which] would thwart the victims' quest for" justice. (Memorandum in Opposition by Plaintiffs' Executive Committee ("Memo in Opp.") at 2). The defendant disputes this contention.

Plaintiffs' preliminary concern, regarding defendant's amenability to process in the alternative forum, is more than sufficiently met in the instant case. Union Carbide has unequivocally acknowledged that it is subject to the jurisdiction of the courts of India (Defendant's Memorandum in Reply filed December 20, 1985 ("Reply Memo") at 8); (oral argument January 3, 1986, transcript at 29, comment of Bud Holman, counsel for Union Carbide). Union Carbide is definitely amenable to process in India.

Beyond this initial test, plaintiffs and *amicus curiae*[4] argue that the Indian legal system is inadequate to handle the Bhopal litigation. In support of this position, plaintiffs have submitted the affidavit of Professor Marc S. Galanter of the University of Wisconsin Law School. Professor Galanter's credentials are impressive; he was a Fulbright Scholar at the Faculty of Law of Delhi University and specializes in South Asian Studies at the University of Wisconsin Law School. He is not, however, admitted to practice in India and the Court views his opinions concerning the Indian legal system, its judiciary and bar as far less persuasive than those of N.A. Palkhivala and J.B. Dadachanji, each of whom has been admitted to practice in India for over 40 years. Both are Senior Advocates before the Supreme Court of India. Mr. Palkhivala served as Indian Ambassador to the United States from 1977 to 1979, and has represented the Indian government on three occasions before international tribunals.

Although the outcome of this analysis, given the rule of *Piper* regarding change in law, seems self-evident, the Court will review plaintiffs' argument on the inadequacy of the Indian forum out of deference to the plaintiffs.

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[4] Rob Hager, Esq. for Citizens Commission on Bhopal, National Council of Churches, United Church of Christ Commission for Racial Justice, *et al.*

A. Innovation in the Indian Judicial System.

Professor Galanter describes the Indian common law legal system, inherited from the British, in terms of its similarity to that of other common law systems. He compares the system favorable to that of the United States or Great Britain in terms of the appellate structure, the rule of *stare decisis,* the role of the judiciary as "guardian of [India's] democratic structure and protector of citizens' rights." (Galanter Aff., at 6-12) before pointing to its ostensible deficiencies. According to Professor Galanter, India's legal system "was imposed on it" during the period of colonial rule. (Galanter Aff. at 11). Galanter argues that "Indian legal institutions still reflect their colonial origins," (Galanter Aff. at 12), in terms of the lack of broadbased legislative activity, inaccessibility of legal information and legal services, burdensome court filing fees and limited innovativeness with reference to legal practice and education. (Galanter Aff. at 12).

On the question of innovativeness, Mr. Palkhivala responds with numerous examples of novel treatment of complex legal issues by the Indian Judiciary.[5] In the words of the former ambassador of India to the United States, "a legal system is not a structure of fossils but is a living organism which grows through the judicial process and statutory enactments." (Palkhavala Aff. at 3). The examples cited by defendant's experts suggest a developed and independent judiciary. Plaintiffs present no evidence to bolster their contention that the Indian legal system has not sufficiently emerged from its colonial heritage to

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[5] For example, Mr. Palkhivala describes four cases in which the Indian Supreme Court crafted new and "courageous" remedies in situations relating to abridgements of fundamental rights. (Palkhivala Aff. at 6-7). Mr. Dadachanji describes similar decisions in which he participated as an advocate, in his affidavit. (Dadachanji Aff. at 2-3). The Court recognizes the innovativeness of the Indian Courts, while refraining from an exhaustive survey of Indian case law.

display the innovativeness which the Bhopal litigation would demand. Their claim in this regard is not compelling.

B. Endemic Delays in the Indian Legal System

Galanter discusses the problems of delay and backlog in Indian courts. Indeed, it appears that India has approximately one-tenth the number of judges, per citizen, as the United States,[6] and that postponements and high caseloads are widespread. Galanter urges that the backlog is a result of Indian procedural law, which allows for adjournments in mid-hearing, and for multiple interlocutory and final appeals. Numerous appeals and "[c]onsiderable delay [are] caused by the tendency of courts to avoid the decision of all the matters in issue in a suit, on the ground that the suit could be disposed of on a preliminary point." (Galanter Aff. at 17; 18–20, 21, quoting Indian Law Commission, 54th Report (1973) pp. 12-13).

This Court acknowledges that delays and backlog exist in Indian courts, but United States courts are subject to delays and backlog, too. *See* Remarks of Honorable Warren E. Burger, Chief Justice, Supreme Court of the United States, 100 F.R.D. 499, 534 (1983).

However, as Mr. Palkhivala states, while delays in the Indian legal system are a fact of judicial life in the proposed alternative forum, there is no reason to assume that the Bhopal litigation will be treated in ordinary fashion.

The Bhopal tragedy has already been approached with imagination in India. Demonstrating the creativity and flexibility of the Indian system, the Parliament of India has passed the Bhopal Act in order to deal with the cases arising from the sad events of December 3, 1984. The Bhopal Act permits the cases to be treated "speedily, ef-

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[6] India allegedly has 10.5 judges per million population, as compared to 107 judges per million in the United States (Galanter Aff. at 15).

fectively, equitably and to the best advantage of the claimants." (Palkhivala Aff. at 11).

Mr. Dadachanji refers to another Indian case which arose from a gas leak in New Delhi. The Chief Justice and another Justice of the Supreme Court of India ordered the presiding court to expedite adjudication of claims. *MC Mehta v. Union of India.* (Dadachanji Aff. at 11 and Annexure A thereto). In another instance, the Indian Supreme Court directed the High Court to hear a given matter on a daily basis, and set a deadline for delivering judgment (Dadachanji Aff. at 11 and Annexure B thereto). Other means of coping with delay are appointment of special tribunals by the Government of India (Dadachanji Aff. at 12 and Annexure C thereto), and assignment of daily hearing duties to a single special judge, otherwise unburdened, to hear a special matter. (Dadachanji Aff. at 11). This Court is persuaded, by the example of the Bhopal Act itself and other cases where special measures to expedite were taken by the Indian judiciary, that the most significant, urgent and extensive litigation ever to arise from a single event could be handled through special judicial accommodation in India, if required.

C. Procedural and Practical Capacity of Indian Courts

Plaintiffs contend that the Indian legal system lacks the wherewithal to allow it "to deal effectively and expeditiously" with the issues raised in this lawsuit. (Memo in Opp. p. 53).

Plaintiffs urge that Indian practitioners emphasize oral skills rather than written briefs. They allegedly lack specialization, practical investigative techniques and coordination into partnerships. These factors, it is argued, limit the Indian bar's ability to handle the Bhopal litigation. As Mr. Dadachanji indicates, Indian lawyers have competently dealt with complex technology transfers, suggesting capability within the technological and scientific areas of legal practice, if not "specialization." (Dadachanji Aff. at 8).

Moreover, Indian attorneys use experts, when necessary. As to investigative ability, Mr. Dadachanji persuasively points out that the Central Bureau of Investigation ("CBI") of the Union of India is well equipped to handle factual inquiry, as is the Commission of Enquiry constituted by the state of Madhya Pradesh. (Dadachanji Aff. at 8). While Indian attorneys may not customarily join into large law firms, and as Mr. Palkhivala states, are limited by present Indian law to partnerships of no more than twenty, this alone or even in concert with other factors does not establish the inadequacy of the Indian legal system. (Palkhivala Aff. at 8). There is no reason the Indian legislature could not provide for the expansion of law firms, if such a choice is required. In any event, this Court is not convinced that the size of a law firm has that much to do with the quality of legal service provided. Many small firms in this country perform work at least on a par with the largest firms. Bigger is not necessarily better.

Moreover, since the Union of India purports to represent all the claimants, it is likely that if the case were transferred to India, the Attorney General o Solicitor General of India and the Advocate General of Madhya Pradesh, with attendant staffs, would represent the claimants. The Indian bar appears more than capable of shouldering the litigation if it should be transferred to India. (Palkhivala Aff. at 9).

Next, plaintiffs and Professor Galanter argue that the substantive tort law of India is not sufficiently developed to accommodate the Bhopal claims. Plaintiffs trace the lack of sophistication in Indian tort law to the presence of court fees for litigants as inhibiting the filing of civil suit. Tough the filing fees may have had historical significance, they are irrelevant here. Professor Galanter acknowledges that court fees may be waived for "poor parties or for specific classes of litigants." (Galanter Aff. at 21). In fact, filing fees have been waived for claimants in India in the Bhopal litigation already begun there.

Professor Galantar asserts that India lacks codified tort law, has little reported case law in the tort field to serve as precedent, and has no tort law relating to disputes arising out of complex product or design liability. (Galanter Aff. at 30–36). As an illustration of the paucity of Indian tort law, Professor Galanter states that a search through the *All-India Reports* for the span from 1914 to 1965 revealed only 613 tort cases reported. (Galanter Aff. at 32). Mr. Dadachanji responds that tort law is sparsely reported in India due to frequent settlement of such cases, lack of appeal to higher courts, and the publication of tort cases in specialized journals other than the *All-India Reports*. (Dadachanji Aff. at 16–17; Palmivala Aff. at 10). In addition, tort law has been codified in numerous Indian statutes. (Dadachnji Aff. at 16–17).

As Professor Galanter himself states, "the major categories of tort, their elements, the [theories] of liability, defenses, *respondeat superior*, the theories of damages—are all familiar." (Galanter Aff. at 37). What is different, Galanter asserts, is the complete absence of tort law relating to high technology or complex manufacturing processes. This is of no moment with respect to the adequacy of the Indian courts. With the groundwork of tort doctrine adopted from the common law and the precedential weight awarded British cases, as well as Indian ones, it is obvious that a well-developed base of tort doctrine exists to provide a guide so Indian courts presiding over the Bhopal litigation. In any event, much tort lay applied in American cases involving complex technology has its source in legal principles first enunciated in Victorian England. *See, e.g., Rylands v. Fletcher*, 1868, L.R. 3 H.L. 330. As Mr. Palkhivala stated it his affidavit:

> The plant itself was the product of highly complex technology, but complexity of the technology cannot be equated with complexity of legal issues. The principles of liability and damages involved in the Bhopal cases are all well established in India. the complexity

> is not in the nature or determination of legal issues but in the application of the law to the events which took place in Bhopal. Well settled law is to be applied to an unusual occurrence.

(Palkhivala Aff. at 7).

Plaintiffs next assert that India lacks certain procedural devices which are essential to the adjudication of complex cases, the absence of which prevent India from providing an adequate alternative forum. They urge that Indian pretrial discovery is inadequate and that therefore India is an inadequate alternative forum. Professor Galanter states that the only forms of discovery available in India are written interrogatories, inspection of documents, and requests for admissions. Parties alone are subject to discovery. Third-party witnesses need not submit to discovery. Discovery may be directed to admissible evidence only, not material likely to lead to relevant or admissible material, as in the courts of the United States. Parties are not compelled to provide what will be actual proof at trial as part of discovery.

These limits on discovery are adopted from the British system. Similar discovery tools are used in Great Britain today. This Court finds that their application would perhaps, however, limit the victims' access to sources of proof. Therefore, pursuant to its equitable powers, the Court directs that the defendant consent to submit to the broad discovery afforded by the United States Federal Rules of Civil Procedure if or when an Indian court sits in judgment or presides over pretrial proceedings in the Bhopal litigation.[7] Any dismissal of the action now before this Court

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[7] A federal court has the power to condition transfer under the doctrine of *forum non conveniens* upon "the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims." *Piper* at 257, n. 25, 102 S.Ct. 267, n. 25. While the Court feels that it would be fair to bind the plaintiffs to American discovery rules, too, it has no authority to do so.

is thus conditioned on defendant's consent to submit to discovery on the American model, even after transfer to another jurisdiction.

The ostensible lack of devices for third-party impleader or for organizing complex cases under the law of the state of Madhya Pradesh are two other procedural deficiencies which plaintiffs assert preclude a finding that India offers an adequate alternative forum. Assuming for the moment that, upon appropriate transfer, the Bhopal litigation would be adjudicated by the local district court in Bhopal, and that the law of Madhya Pradesh would be applied, this Court is still not moved by plaintiffs' argument regarding impleader or complex litigation.

Although no specific provision in the Indian Code of Civil Procedure permits the impleading of third-parties from whom contribution is sought, other provisions in the Code do provide for impleader. As both parties to this motion state, Order 1, Rule 10(2) of the Indian Code of civil Procedure "allows the court to add additional parties if the presence of those parties is 'necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit.' " (Galanter Aff. at 60; Dadachanji Aff. at 18). Professor Galanter posits that a joint tortfeasor would not be considered a necessary party, and would not be joined. Defendant's expert, conversely, asserts that a party can be added to prevent multiplicity of suits and conflicts of decisions. Thus, Mr. Dadachanji argues, defendants would be able to seek contribution from third-parties if joinder would prevent repetitive litigation or inconsistency. Moreover, the broad provision of inherent powers to aid the ends of justice, as codified at Section 151 of the Indian Code of civil Procedure would prevent an ultimate miscarriage of justice in the area of impleader. (Dadachanji Aff. at 19).[8]

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[8] The Court observes that the alleged problem would appear to act

The absence of procedures or mechanisms within the Indian judiciary to handle complex litigation is presented as support for plaintiffs' position regarding the non-existence of an adequate alternative forum. Professor Galanter asserts, for example, that Indian judges do not promote settlements. The point is wholly irrelevant to the question of whether an adequate alternative forum exists. In any event, this Court has labored hard and long to promote settlement between the parties for over a year, to no avail. It would appear that settlement, although desirable for many reasons, including conservation of attorneys' fees and costs of litigation, preservation of judicial resources, and speed of resolution, is unlikely regardless of the level of activism of the presiding judge.

Plaintiffs' next contention is that since no class action procedure exists in India expeditious litigation of the Bhopal suits would be impossible. As with all of plaintiffs' other arguments, this purported deficiency does not constitute "no remedy" at all. Professor Galanter himself acknowledges that Order 1, Rule 8 of the Indian Code of Civil Procedure provides a mechanism for "representative" suits, "where there are numerous persons having the same interest in one suit." (Galanter Aff. at 54). Even if the current state of Indian law regarding "representative" suits involves application of the mechanism to pre-existing groups such as religious sects or associations, there is no reason to conclude that the Indian legislature, capable of enacting the Bhopal Act, would not see its way to enacting a specific law for class actions. In addition, it does not appear on the face of Order 1, rule 8 that the "repre-

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to the detriment of defendant, not plaintiffs. It is Union Carbide which urges that third-party defendants are necessary. (Memo in Support at 27-28). Defendant discounts the supposed unavailability of third-party impleader, while the plaintiffs find its lack objectionable. These postures lead the Court to the conclusion that this argument is not compelling in either direction. The lack of specific third-party practice will not concern the Court if it does not concern Union Carbide.

sentative" suits is expressly limited to pre-existing groups. The Indian district court could adopt the rule for use in a newly created class of injured, whose members all have "the same interest" in establishing the liability of the defendant. An Indian court has law available to create a representative class, or perhaps a few different representative classes. The "scheme" for registration and processing of claims, *see supra,* at 4, could perform the task of evaluating the specific amounts of claims. Moreover, Mr. Dadachanji gives at least three examples where Indian courts have consolidated suits pursuant to their inherent power under Section 151 of the Indian Code of civil Procedure. In at least one case, such consolidation allegedly occurred without consent of the parties. (Dadachanji Aff. at 9). The absence of a rule for class actions which is identical to the American rule does not lead to the conclusion that India is not an adequate alternative forum.

Final points regarding the asserted inadequacies of Indian procedure involve unavailability of juries or contingent fee arrangements in India. Plaintiffs do not press these arguments, but Mr. Palkhivala touches upon them. They are easily disposed of. The absence of juries in civil cases is a feature of many civil law jurisdictions, and of the United Kingdom. *Piper* at 252, n. 18, 102 S.Ct. at 264, n. 18 and citations therein. Furthermore, contingency fees are not found in most foreign jurisdictions. *Piper* at 252, n. 18, 102 S.Ct. at 264, n. 18. In any event, the lack of contingency fees is not an insurmountable barrier to filing claims in India, as demonstrated by the fact that more than 4,000 suits have been filed by victims of the Bhopal gas leak in India, already. According to Mr. Palkhivala, moreover, well-known lawyers have been known to serve clients without charging any fees. (Palkhivala Aff. at 8).

Plaintiffs' final contention as to the inadequacy of the Indian forum is that a judgment rendered by an Indian court cannot be enforced in the United States without resort to further extensive litigation. Conversely, plaintiffs

assert, Indian law provides *res judicata* effect to foreign judgments, and precludes plaintiffs from bringing a suit on the same cause of action in India. (Galanter Aff. at 63–65). Mr. Dadachanji disputes this description of the Indian law of *res judicata.* He asserts that the pendency, or even final disposition, of an action in a foreign court does not prevent plaintiffs from suing in India upon the original cause of action. Plaintiffs would not be limited, Mr. Dadanchanji argues, to an Indian action to enforce the foreign judgment. (Dadachanji Aff. at 19–20). In addition, he states that an Indian court, before ordering that a foreign judgment be given effect, would seek to establish whether the foreign court had failed to apply Indian law, or misapplied Indian law. (Dadachanji Aff. at 20).

The possibility of non-enforcement of a foreign judgment by courts of either country leads this Court to conclude that the issue must be addressed at this time. Since it is defendant Union Carbide which, perhaps ironically, argues for the sophistication of the Indian legal system in seeking a dismissal on grounds of *forum non conveniens,* and plaintiffs, including the Indian Government, which state a strong preference for the American legal system, it would appear that both parties have indicated a willingness to abide by a judgment of the foreign nation whose forum each seeks to visit. Thus, this Court conditions the grant of a dismissal on *forum non conveniens* grounds on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India. absent such consent to abide by and to "make good" on a foreign judgment, without challenge except for concerns relating to minimal due process, the motion to dismiss now under consideration will not be granted. The preference of both parties to play ball on a distant field will be taken to its limit, with each party being ordered to be bound by the decision of the respective foreign referees.

To sum up the discussion to this point, the Court determines that the Indian legal system provides an adequate alternative forum for the Bhopal litigation. Far from exhibiting a tendency to be so "inadequate or unsatisfactory" s to provide "no remedy at all," the courts of India appear to be well up to the task of handling this case. Any unfavorable change in law for plaintiffs which might be suffered upon transfer to the Indian courts, will, by the rule of *Piper,* not be given "substantial weight." Differences between the two legal systems, even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum. As Mr. Palkhivala asserts with some dignity, "[w]hile it is true to say that the Indian system today is different in some respects from the American system, it is wholly untrue to say that it is deficient or inadequate. Difference is not to be equated with deficiency." (Palkhivala Aff. at 4). *Piper* at 254, 102 S.Ct. at 265. The inquiry now turns to a weighing of the public and private interest factors.

2. Private Interest Concerns.

The *Gilbert* Court set forth a list of considerations which affect the interests of the specific litigants to an action, and which should be weighed in making a *forum non conveniens* determination. The so-called private interest factors, along with public interest factors discussed below, were not intended to be rigidly applied. As the Court stated in *Piper,*

> "[E]ach case turns on its facts." If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the flexibility that makes it so valuable.

Piper at 249–50, 102 S.Ct. at 263. Recognizing that "[p]articularly with respect to the question of relative ease of access to sources of proof," "the private interests point in both directions," the Supreme Court nevertheless upheld a district court's decision to dismiss a case in favor of the

relative convenience of a forum in Scotland. *Piper* at 257, 102 S.Ct. at 267. By contrast, this Court finds that the private interests point strongly one way. As in *Piper,* it appears that the burdensome effect of a trial in this forum supports a finding that the private interest factors in this case weigh strongly in favor of dismissal.

A. Sources of Proof.

The first example of a private interest consideration discussed in *Gilbert* is "relative ease of access to sources of proof." As stated, the analysis of this issue must hinge on the facts. Limited discovery on the issue of *forum non conveniens* has taken place, pursuant to the Court's order of August 14, 1985.[9] The Court can therefore proceed to discuss this question.

Union Carbide argues that virtually all of the evidence which will be relevant at a trial in this case is located in India. Union Carbide's position is that almost all records relating to liability, and without exception, all records relevant to damages, are to be found in and around Bhopal. On the liability question Union Carbide asserts that the Bhopal plant was managed and operated entirely by Indian nationals, who were employed by UCIL. (Affidavit of Warren J. Woomer, formerly Works Manager of the Bhopal plant ("Woomer Aff.") at 2). Defendant asserts that the Bhopal plant is part o UCIL's Agricultural Products Division, which has been a separate division of UCIL for at least 15 years, and that the plant had "limited contact" with UCIL's Bombay headquarters, and almost no contact with the United States. (Woomer Aff. at 4, 32). Woomer claims to have been the last American employed by UCIL. He departed from Bhopal in 1982. (Woomer Aff. at 2).

Woomer describes the structure and organization of the Bhopal facility at the time of the accident. The plant had

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[9] Discovery was ably managed by Magistrate Michael H. Dolinger, of the Southern District of New York.

seven operating units, each headed by a manager or department head, each an Indian national.[10] The managers or department heads each reported either directly to the plant's General Works Manager, or to one of three Assistant Works Managers. (Woomer Aff. at 6). Each of these is also an Indian national. Three of the operating units which at this very early state of inquiry into liability appear to have been potentially involved in the MIC leak are the Carbon Monoxide, MIC/Phosgene and Carbamoylation units. (Woomer Aff. at 7–10). The Carbon Monoxide and MIC/Phosgene units together employed 63 employees, all Indian nationals. (Woomer Aff. at 9). The Carbamoylation unit employed 99 Indian nationals. (Woomer Aff. at 10). Mr. Woomer states that an inquiry into the cause of the accident would require interviews with at least those employees who were on duty at the Bhopal facility "immediately prior or after the accident;" Mr. Woomer asserts that there are 193 employees, all Indians, who must be interviewed. (Woomer Aff. at 58).[11]

In addition to the seven operating units, the Bhopal plant contained seven functional departments which serviced operations.[12] The seven heads of the units reported within the plant much as the department heads did.

The maintenance unit was apparently subdivided into departments including Instrumentation, Mechanical Main-

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[10] The seven operating units included Carbon Monoxide, MIC/Phosgene, Carbamoylation, Alpha Naphthol, Aldicarb, Utilities and Formulations.

[11] Mr. Woomer states that a post-accident technical team sought to interview these 193 employees. According to Mr. Woomer, the Indian CBI, which had stepped into the plant following the tragedy, advised the technical team that interviews could be conducted only of the General Works Manager and MIC Production Manager, neither of whom was present at the time of the leak. (Woomer Aff. at 57–58).

[12] The seven functional units were Maintenance, Quality Control, Stores, Purchasing, Safety/Medical, Industrial Relations and Works Office. (Woomer Aff. at 6).

tenance, both part of the Agricultural Chemical Maintenance unit, which employed 171 people in total, and Plant Engineering and Formulation Maintenance, which employed 46 people. (Woomer Aff. at 11–12). In addition, the Utilities and electrical department employed 195 people. (Woomer Aff. at 13). According to Mr. Woomer, the various maintenance organizations performed repairs on equipment, provided engineering support, fabricated certain equipment, salvaged other portions, and controlled utilities, temperatures and pressures throughout the plant. (Woomer Aff. at 11–14).

Moreover, according to Mr. Woomer, these UCIL departments also kept daily, weekly and monthly records of plant operations, many of which were purportedly seized by the CBI and selected for copying by CBI immediately after the accident.[13] The records and reports of the various maintenance units would likely be relevant to the question of liability at trial.

Of the additional functional units, it is possible that Quality Control, with 54 employees, Purchasing, with 53, or Stores may have been directly involved in the disaster by virtue of their participation in analyzing plant output, procuring raw materials for the chemical processes of the plant, and maintaining spare parts and certain chemicals. (Woomer Aff. at 14–19). thus, the records and reports of these three departments may be necessary to an investigation of liability. While examination of members of the Works Office department and Industrial Relations department would likely be less directly useful, information regarding plant budgets and employee histories might be of relevance. Of great importance are the records and reports

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[13] Mr. Bud Holman, counsel for Union Carbide, states in his second affidavit that over 36,000 of the 78,000 pages of documents seized by the CBI represent plant operation records. (Holman Aff. # 2 at 5). He asserts that 1,700 pages deal with maintenance work performed in 1983 and 1984. (Holman Aff. # 2 at 8).

of the Safety/Medical department, which was responsible for daily auditing of safety performance in all departments, training and testing on safety rules, maintaining safety statistics and planning and implementing safety drills. (Woomer Aff. at 22-23). The 31 Indian employees of this department worked with the Central Safety Committee of the plant, whose members were drawn from plant management and the Departmental Safety Committees. Operating units were required to monitor plant safety mechanisms weekly, and to keep monthly checklists. (Holman Aff. #2 at 9). The Central Safety Committee met monthly, as did the Departmental Safety Committees. (Woomer Aff. at 39). The MIC Unit held monthly safety committee meetings, for example, and issued monthly reports. (Woomer Aff. at 41). Quarterly "Measures of Performance" reviews also covered safety issues, and were required of each operating unit. (Woomer Aff. at 40). Certainly, interviews of the plant personnel involved in safety reports and audits would be particularly relevant to the investigation of the disaster.

Plaintiffs refer to three occasions upon which Union Carbide, not UCIL, employees conducted safety audits at the Bhopal plant. As defendant correctly argues, these there events constitute a very small fraction of the thousands of safety audits conducted at the Bhopal facility. The three audits, moreover, were conducted in 1979, the fall of 1980 and in May of 1982, many years prior to the accident which is the subject of this lawsuit. (Plaintiffs' Memo in Opp. at 25).[14]

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[14] The 1982 "Operational Safety Survey" was apparently fairly extensive. It was conducted by three United States employees of Union Carbide, and led to a report which discussed "major" concerns and possibility of "serious personnel exposure." (Memo in Opp. at 25). Mr. Woomer asserts, and plaintiffs do not refute, that this Survey was not intended to "serve a policing function," but was performed at the specific request of UCIL. In addition, follow-up responsibility "rested

Two accidents which occurred previously at the Bhopal plant might also be of relevance to the liability inquiry in this litigation. On December 24, 1981, a phosgene gas leak killed a UCIL maintenance worker. Reports of the fatality were sent to Union Carbide management in the United States. (Woomer Deposition, Exs. 30 and 31). Plaintiffs assert that the accident report called for increased training in Bhopal by United States employees of Union Carbide's Institute, West virginia, plant. Defendant states that the responsibility for remedying problems in the Bhopal plant rested with the plant itself, and that Union Carbide did not make any recommendations, and was involved only to the extent of receiving a copy of the report which called for its involvement in further training. (Woomer Aff. at 41).

The second accident at Bhopal prior to the disaster of December, 1984 took place on February 9, 1982, when a pump seal, perhaps improperly used, failed. (Memo in Opp. at 24; Woomer Aff. at 41). Many employees were injured, and at least 25 were hospitalized. Plaintiffs discuss the fact that Robert Oldford, president of Union Carbide Agricultural Products Company ("UCAPC") a wholly-owned subsidiary of Union Carbide headquartered in the United States, was in Bhopal at the time of the February 1982 leak. (Memo in Opp. at 24). Union Carbide asserts that Mr. Oldford was visiting UCIL's Research and Development Centre, located several miles from the Bhopal plant for an unrelated purpose, and was only coincidentally in Bhopal when the leak occurred. To the extent that this presence in India in 1982 has any significance, Mr. Oldford, and any other United States employees of Union Carbide

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exclusively with UCIL plant management." (Woomer Aff. at 37-38).

Moreover, Union Carbide states that the Union of India, itself, conducted similar safety audits and made recommendations. (Affidavit of Ranjit K. Dutta, Business Manager of Union Carbide Agricultural Products Company ("Dutta Aff.") at 58-64).

who conducted safety audits in Bhopal or were present when accidents occurred there, may be flown to Bhopal for testimony or discovery.

In addition to safety data, two other types of proof may be relevant to a trial of this case on the merits. Information regarding plant design, commissioning and start-up may bear upon the liability question. Information pertinent to employee training should also have significance.

Leaving aside the question of whether the government of India or UCIL chose the site and product of the Bhopal plant, the Court will evaluate the facts which bear on the issue of relevant records. The findings below concern the location of proof only, and bear solely upon the *forum non conveniens* motion. The Court expressly declines to make findings as to actual liability t this stage of the litigation.

Plaintiffs and defendant agree that in 1973 Union Carbide entered into two agreements with UCIL which were entitled "Design Transfer Agreement" and "Technical Service Agreement." According to plaintiffs, Union Carbide, pursuant to the Design Transfer Agreement, provided a process design to UCIL, the "detailing [of which] was undertaken in India." (Memo in Opp. at 17). The process design package consisted of the basic plan of the factory, which was to be fleshed out in the detailing phase. Plaintiffs state that at least nine Union Carbide technicians travelled to India to monitor the progress of the project. Union Carbide also allegedly assigned a "key engineer," John Couvaras, to serve as UCIL Bhopal project manager. Mr. Couvaras allegedly "assumed responsibility for virtually every aspect of the detailing of the process design," and approved detail reports of "not only UCIL but also independent contractors, including Humphreys & Glasgow Consultants Private Ltd. and Power Gas Limited" of Bombay, India. (Memo in Opp. at 17–20).[15]

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[15] Plaintiffs assert that Mr. Couvaras exemplifies Union Carbide's

Plaintiffs also claim that "[n]o change of any substance was made from Union Carbide's design during the detailing phase." Plaintiffs note that only "one portion" of the process design work provided to UCIL by Union Carbide was not used. (Memo in Opp. at 20). In effect, plaintiffs seek to establish that Union Carbide was the creator of the design used in the Bhopal plant, and directed UCIL's relatively minor detailing program. They urge that for the most part relevant proof on this point is located in the United States.

Defendant seeks to refute this contention, with notable success. Turning first to the affidavit of Robert C. Brown, who describes himself as "chief negotiator for Union Carbide Corporation in connection with the two agreements it entered into with . . . UCIL in November, 1973," the Court is struck by the assertion that the two agreements were negotiated at "arms-length" pursuant to Union Carbide corporate policy, and that the Union of India mandated that the Government retain "specific control over the terms of any agreements UCIL made with foreign companies such as Union Carbide Corporation." (Brown Aff. at 3–4).[16]

"international employee" whose mobility throughout the Union Carbide affiliates causes "[a]ny notion of discrete corporate identities [to] blur[ ]." (Memo in Opp. at 18–19).

[16] As support, Mr. Brown points to the Union Carbide Corporate Policy Manual, Section 1.10 which states:

> The "arms-length principle" is a central consideration in transfer and pricing of all technology transactions with affiliates.

"Arms length" is defined as:

> The principle whereby inter-company transactions between Union Carbide and its affiliates, or between affiliates, will reflect the cost to unrelated parties of the same or similar technology under similar circumstances.

(Plaintiffs' Exhibit 3). Thus, Mr. Brown argues that Union Carbide related with UCIL much as it would have with an unaffiliated, or even competing company.

Mr. Brown alleges that the Letter of Intent issued by the Union of India in March 1972, pursuant to which construction and design of the plant were allowed to ensue provided, *inter alia*, that:

> (2) [F]oreign collaboration and import of equipment be settled to the satisfaction of the Government.

Mr. Brown claims, on personal information, that UCIL told him that Union Carbide would not be allowed to be involved in the Bhopal project beyond the provision of process design packages. (Brown Aff. at 5). The Design Transfer Agreement indicates that Union Carbide's duty under the Agreement was to provide process design packages, and that UCIL, not Union Carbide, would be responsible to "detail design, erect and commission the plant." (Defendant's Ex 4, § 4.1). Union Carbide, accordingly, issued limiting warranties with respect to the design packages, detailing of which it would not be involved with. (Brown Aff. at 7, Ex. 4, §§ 4.1, 12.3).

The nature of UCIL's detail work is discussed in the affidavit of Ranjit K. Dutta, who has held various positions at UCIL and UCAPC. From 1973 through 1976, Mr. Dutta was employed as General Manager of the Agricultural Products Division of UCIL. (Dutta Aff. at 2).

Mr. Dutta asserts that the Bhopal facility was built by UCIL over the eight years from 1972 to 1980. (Dutta Aff. at 8). He asserts that Union Carbide's role in the project was "narrow", and limited to providing "certain process design packages for certain parts of the plant." (Dutta Aff. at 9). He continues, stating:

> [T]he process design packages which Union Carbide Corporation provided are nothing more than summary design starting points. . . . They set forth only the general parameters. . . . A plant cannot be constructed from a process design package. The detail design comprises approximately 80 percent of the sum of the

> man hours involved in the design of any project and transposes the general process design parameters into an actual design which can be used for purchasing equipment and actual construction.

(Dutta Aff. at 9–12). (emphasis omitted).

According to Mr. Dutta, during the five years between the date upon which Union Carbide submitted process designs, and the date upon which the plant started-up, there were only four visits to Bhopal by Union Carbide process design engineers. (Dutta Aff. at 14). In contrast, he asserts that ten to fifteen UCIL engineers, working primarily out of Bombay, were involved in design detailing. (Dutta Aff. at 16). These UCIL engineers oversaw the 55 to 60 Indian engineers employed by the Bombay engineering firm which performed the detail design work. This firm, Humphreys and Glasgow, submitted designs and drawings to the UCIL engineers for approval. Corrected drawings were returned by UCIL to Humphreys and Glasgow for changes, and sent back to UCIL for final approval. (Dutta Aff. at 19–24).[17] Mr. Dutta alleges that "at no time were Union Car-

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[17] Humphreys and Glasgow was allegedly responsible for the following:

> Among other things, developing final equipment and unit layouts and plot plans, including equipment layout drawings, detailed piping arrangement drawings, layout of electrical equipment; the steel structure, including detail design and working drawings for the buildings and foundation; mechanical equipment design including specification of all proprietary and fabricated equipment; review and certification of vendor's drawings and documents, preparation of orthographic piping drawings for all portions of the plant, preparation of isometric piping drawings, preparation of preliminary and final bills of materials for pipes, valves, gaskets, instrument associated hardware, electrical conduit; electrical engineering work, instrument engineering, including drawings on instrument hook ups, lists of instruments, review of instrument specification and data sheets; definition of material and make calculation to size insulation, preparation of insulation lists, preparation of material

bide Corporation engineering personnel from the United States involved in approving the detail design or drawings prepared upon which construction was based. Nor did they receive notices of changes made." (Dutta Aff. at 24).

Mr. Dutta expressly states that the MIC storage tank and monitoring instrumentation were fabricated or supplied by two named Indian sub-contractors. The vent gas scrubber is alleged to have been fabricated in the Bhopal plant shop. (Dutta Aff. at 25).

Of the 12,000 pages of documents purportedly seized by the CBI regarding design and construction of the Bhopal plant, an asserted 2,000 are design reports of Humphreys and glasgow, UCIL or other contractors. Defendant claims that blueprints and calculations and comprise another 1,700 pages of documents held by the CIB. Five thousand pages of contractors' files, including specifications and contracts are asserted to be in India. In addition, Union Carbide claims that blueprints and diagrams may not reflect final design changes as incorporated into the actual plant and that the detail design engineers' testimony will be needed to determine the configuration of the actual plant.[18] (Holman Aff. #2 at 15–16).

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take off and inquiry specification packages, procurement assistance including assisting in evaluation of bids and selection of vendors, inspection of certain equipment and materials to ensure proper workmanship and compliance with specifications and codes, and coordinating where Indian law required inspection or certification by governmental inspections; preparation of a project schedule, project reports and costs control reports at least once per month, construction supervision including supervision of mechanical testing of installed equipment, assistance in commissioning.

(Dutta Aff. at 19–20).

[18] Mr. Couvaras, whom plaintiffs assert was a "key engineer" for the project, and enjoyed mobility between Union Carbide and UCIL, is described by Mr. Dutta as primarily a UCIL employee. The "international employee" status he carried is explained as a pension accounting mechanism. (Dutta Aff. at 27).

One final point bearing on the information regarding liability is contained in the affidavit of Edward Munoz, at a relevant time the General manager of UCIL's Agricultural Products Division. He later acted as Managing Director of UCIL. Mr. Munoz has submitted an affidavit in which he states that Union Carbide decided to store MIC in large quantities at the Bhopal plant, despite Mr. Munoz' warnings that MIC should be stored only in small amounts because of safety. (Memo in Opp. at 15–16; Munoz Aff.). Mr. Dutta, for defendant, asserts that there was never any issue of token storage of MIC at Bhopal, as Mr. Munoz states, and that there is no truth to Mr. Munoz' assertion that he was involved in the storage issue. (Dutta Aff. at 30).[19] The Court cannot make any determination as to the conflicting affidavits before it. This question, which involves credibility concerns, is left for later in the litigation. To the extent that this particular matter bears upon the relative ease of access to sources of proof, Mr. Munoz and Mr. Dutta both may be called to testify at trial or discovery. Mr. Dutta's home is in Bhopal. (Dutta Aff. at 1). The Court is not aware of the whereabouts of Mr. Munoz at this time. Either of the two could travel to either alternative forum.

In addition to design and safety records, material regarding training of Bhopal personnel is likely to be relevant to the question of liability. Plaintiffs state that Warren Woomer supervised the training of UCIL personnel at Union Carbide's Institute, West Virginia plant. According to plaintiffs, 40 UCIL employees were transported to In-

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[19] Mr. Dutta asserts that Mr. Munoz was a paid consultant to a member of Plaintiffs' Executive Committee at the time the affidavit was made. No documentary proof of this assertion has been submitted. (Dutta Aff. at 31; Holman Aff. # 2 at 18). Moreover, two affidavits submitted on behalf of defendant state that Mr. Munoz was removed from his position as Union Carbide Corporation Division President in 1978, and is "extremely bitter as a result of the removal." (Dutta Aff. at 31; Holman Aff. # 2 at 18).

stitute's MIC facility for lengthy training. (Memo in Opp. at 22). Mr. Woomer states in reply that the 40 employees thus trained represented a fraction of the over 1,000 employees who were trained exclusively in Bhopal. (Woomer Aff. at 43). In addition, Mr. Woomer asserts that the training at Institute was pursuant to an arms-length agreement, that UCIL selected the parties to be trained, and that UCIL paid Union Carbide for the training. (Woomer Aff. at 43). Moreover, Mr. Woomer's description of the training provided at Bhopal suggests that each of the plant's employees had lengthy cumulative training, of which the Institute training was but a very small portion. (Woomer Aff. at 46). Personnel records, in any event, are located in Bhopal. (Holman Aff. #2 at 4).

The briefs and affidavits contain considerable discussion on the matter of commissioning and start-up of the Bhopal plant. The Court need not resolve the question of who was responsible for these aspects of plant operation. However, the Court determines that the manual regarding start-up was prepared by Indian nationals employed by UCIL. (Woomer Aff. at 48).

In the aggregate, it appears to the Court that most of the documentary evidence concerning design, training, safety and start-up, in other words, matters bearing on liability, is to be found in India. Much of the material may be held by the Indian CBI. Material located in this country, such as process design packages and training records of the 40 UCIL employees trained as Institute, constitutes a smaller portion of the bulk of the pertinent data than that found in India. Moreover, while records in this country are in English, a language understood in the courts of India, certain of the records in India are in Hindi or other Indian language, as well as in English. (Holman Aff. #2 at 12). The Indian language documents would have to be translated to be of use in the United States. The reverse is not true. It is evident to the Court that records concerning the design, manufacture and operation of the Bho-

pal plant are relatively more accessible in India than in the United States, and that fewer translation problems would face an Indian court than an American court. Since Union Carbide has been directed to submit to discovery in India pursuant to the liberal grant of the American Federal Rules of Civil Procedure, and this opinion is conditioned upon such submission, any records sought by plaintiffs must be made available to them in India. The private interest factor of relative ease of access to sources of proof bearing on liability favors dismissal of the consolidated case.[20] The Indian Government is asserted to have been involved in safety, licensing and other matters relating to liability. Records relating thereto are located in India, as are the records seized by the CBI. Although plaintiffs state that all such records could and would be made available to this Court, it would be easier to review them in India. Transmittal and translation problems would thereby be avoided.

B. Access to Witnesses.

Gilbert teaches a second important consideration under the heading of private interests, the "availability of com-

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[20] Union Carbide asserts throughout its briefs and affidavits that evidence relevant to the question of damages is located in India, as well. Certainly the victims themselves, and, for the most part, their medical records, are found in or near Bhopal. However, as plaintiffs argue, a "head count" of witnesses is not dispositive of a *forum non conveniens* motion. (Memo in Opp. at 74–79). Not all of the victims would need to be transported to the United States to describe their injuries. The Bhopal "scheme" provides a mechanism for evaluating each individual's claim. Only representative plaintiffs need testify as to damages. This Court would not countenance the impractical and time-consuming process of calling each of the approximately 200,000 victims at a trail in this country. Evidence on damages, as well as liability, is found in India, but not to the overwhelming extent contended by defendant. Moreover, the Court is concerned with the policy effect of allowing the number of foreign victims to affect directly the *forum non conveniens* determination. If carried to the extreme, this "head count" doctrine would mean that the more people hurt, the less likely a suit in this country would be.

pulsory process for attendance of willing, and the cost of obtaining attendance of unwilling, witnesses." *Gilbert,* 330 U.S. at 508 67 S.Ct. at 843. As discussed in detail above, most witnesses whose testimony would relate to questions of causation and liability are in India. Engineers from UCIL and Humphreys and Glasgow and other subcontractors, of whom there are hundreds, are located in India. Shift employees from the possibly malfunctioning units, safety monitoring personnel, those responsible for training, safety auditing, procurement, compliance with regulations and other operations might be required to testify. More than likely, many of these potential witnesses do not speak English, and would require translators. Many of the witnesses are not parties to this litigation. Therefore, as the Court of Appeals for the Second Circuit has stated in the context of a *forum non conveniens* motion:

> In fact, the plaintiffs' cases on liability will depend in large measure upon the knowledge and activities of such witnesses as the employees of [companies] who are not parties to this litigation, but who directly participated in the events which gave rise to it. The United States District Court in New York, however, has no power to subpoena any of these witnesses. It is unlikely that many would be willing to travel to New York to testify; and the cost, in any event, would be prohibitively great.

Fitzgerald v. Tedaco, 521 F.2d 448, 451-52 (2d Cir.1975), *cert. denied,* 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976) (footnote omitted). In contrast, the relatively few witnesses who reside in the United States are primarily employed by Union Carbide. As employees of a party they would probably be subject to the subpoena power of Indian courts. Transportation costs would also be lower, since fewer people would have to make the journey to testify.

The presence of the Indian Government in this action is also of critical importance on this motion. Plaintiffs as-

sert that "all necessary officials and employees of the Central Government will voluntarily comply with requests to attend trial." (Memo in Opp. at 70, Answer to No. 124 of Defendant's First Requests for Admission, Exhibit 55). This statement does not provide for attendance by officials of Madhya Pradesh or the Bhopal municipality, whom Union Carbide indicates might be impleaded as third-party defendants. As witnesses only, these officials would not be subject to this Court's subpoena power. As third-party defendants, they might be immune from suit in the United States by the terms of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* State and city officials might also lack sufficient contacts with this district to allow this Court to exercise personal jurisdiction over them.

While Union Carbide might be deprived of testimony of witnesses or even potential third-parties if this action were to proceed in this forum, no such problem would exist if litigation went forward in India.

The unavailability of compulsory process for Indian non-party witnesses, of whom there are many, such as would ensure their presence at a trial in this country, the high cost of transporting the large number of Indian nationals to the United States, as well as the need to translate their testimony should they appear, all support the argument favoring dismissal of this action on *forum non conveniens* grounds. The private interest concerns regarding witnesses emphasize the logic of defendant's position. Relatively fewer witnesses reside in the United States than in India. Almost all of the witnesses located in this country are employees of defendant, and would be subject to compulsory process in India as a result. Transportation costs for the relative few would not compare to the alternate costs of transporting hundreds of Indian witnesses. Since English is widely spoken in India, less translation would be required for foreign witnesses in India than in the converse situation. Should this case be tried in India, fewer obstacles to calling state and local officials as witnesses or

parties would face the defendant. The court determines that this private interest factor weighs in favor of dismissal.

C. Possibility of View.

The third private interest factor articulated in *Gilbert* is the ease of arranging for a view of the premises around which the litigation centers. Plaintiffs assert that the notion that a jury view of the plant and environs is necessary is "simply preposterous." (Memo in Opp. at 71). Plaintiffs note that a viewing of the premises is rarely conducted in products liability cases, since videotapes, pictures, diagrams, schematics and models are more instructive than an actual view. (Memo in Opp. at 71). A viewing of the plant and hutments would probably not be of utmost importance in determining liability, and this consideration is not afforded great weight on this motion.

However, the instant case is not identical to the product design defect case cited by plaintiffs, in which a district court judge determined that "the present appearance of the defendants' facilities may or may not be relevant to production which occurred" in the period in which the allegedly violative manufacture occurred. *Hodson v. A.H. Robins Co., Inc.*, 528 F.Supp. 809, 822 (E.D.Va.1981), *aff'd*, 715 F.2d 142 (4th Cir. 1983). In the instant case, the site of the accident was sealed after the leak, and the present condition of the plant might be relevant to a finding of liability. A viewing may not be necessary, but conceivably could be called for later in the litigation. An Indian court is in a far better position than this Court to direct and supervise such a viewing should never be required. This consideration, though minor, also weighs in favor of dismissal.

In summary, then, the private interest factors weigh greatly in favor of dismissal on grounds of *forum non conveniens*. Since the "balance is strongly in favor of the defendant" and foreign plaintiffs' choice of a foreign forum

is given less than maximum deference, the Court determines that dismissal is favored at this point in the inquiry. *Gilbert* 330 U.S. at 508, 67 S.Ct. at 843.

3. Public Interest Concerns.

The *Gilbert* Court articulated certain factors which affected the interests of non-parties to a litigation to be considered in the context of the doctrine of *forum non conveniens*. These public interest concerns were held to be relevant to a court's determination of whether to dismiss on these grounds. The Supreme Court expressly identified a few factors:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled as its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert at 508–09, 67 S.Ct. at 843. The Court will consider these various factors in turn, as well as others discussed by the parties and *amicus curiae*.

A. Administrative Difficulties.

As is evident from the discussion thus far, the mere size of the Bhopal case, with its multitude of witnesses and documents to be transported and translated, obviously creates administrative problems.

There can be no doubt that the Bhopal litigation will take its toll on any court which sits in judgment on it. This Court sits in one of the busiest districts in the country, and finds, as a matter within its experience, that this is a "congested center" of litigation as described in *Gilbert* at 508. The burden which would be imposed should litigation continue here was aptly described by the Court of Appeals for the Second Circuit in *Schertenlieb v. Traum,* 589 F.2d 1156 (2d Cir.1978). Reviewing a district judge's ruling for dismissal on the grounds of *forum non conveniens,* the Second Circuit observed that "were it not for the somewhat unusual fact that it is the forum resident who seeks dismissal, we would have to say very little regarding the exercise of judge Metzner's discretion in dismissing this case." *Schertenlieb* at 1164. In affirming the ruling for dismissal, the Court of Appeals asked the rhetorical question:

> If litigation is in a clearly inconvenient forum, why should defendant and the court be burdened with its continuing there, if an alternative forum now exists so that plaintiff will not be without a remedy?

Schertenlieb 1163.

This Court has already determined that because of the location of the preponderance of the evidence in India, and the difficulty of transporting documents and witnesses to this forum, this district is clearly an inconvenient forum for the litigation. An alternative forum is seen to exist in India. This Court feels that the answer to the *Schertenlieb* question is clear.

A district judge in this district, in *Domingo v. States Marine Lines,* 340 F.Supp. 811 (S.D.N.Y.1972) evaluated the administrative concerns of the Southern District of New York, relevant to this Court today, a full fourteen years later. The *Domingo* court stated:

> It is scarcely necessary to dwell on the fact that this Court is the most heavily burdened Federal District Court in the country. The Civil Calendar grows more congested all the time. The priority now properly given to the disposition of criminal cases tends to increase this congestion.
>
> * * * * * *
>
> I see no reason why this Court, with its heavy burdens and responsibilities, should be burdened with cases like these which, from every point of view, should be tried in the courts of the nation where all the relevant events occurred and whose citizens are primarily involved. Certainly, this district and the Metropolitan area in which it is situated have no conceivable relation to this litigation except for the fact that the defendant happens to be doing business here.

Domingo at 816.

The defendant in this case, involved as it appears to have been in the process design phase of the plant's construction, may have a slightly less tenuous connection to this forum than a corporation which is merely doing business here. Certain business conducted in New York, or in corporate headquarters in Danbury, Connecticut, may have been directly related to development or operation of the UCIL facility in Bhopal. However, almost "all the relevant events" leading to and following from the accident occurred in India. Indian citizens are primarily involved in the case, both as witnesses and claimants. The substantial administrative weight of this case should be centered on a court with the most significant contacts with the event. Thus, a court in Bhopal, rather than New York, should bear the load.

In addition to the burden on the court system, continuation of this litigation in this forum would tax the time and resources of citizens directly. Trial in this case will

no doubt be lengthy. An assigned jury would be compelled to sit for many months of proof. Because of the large number of Indian language-speaking witnesses, the jurors would be required to endure continual translations which would double the length of trial. The burden on the jurors themselves, and on their families, employers and communities would be considerable. The need for translation would be avoided if trial were to be held in Bhopal.

Clearly, the administrative costs of this litigation are astounding and significant. Despite its deep concern for the victims of the tragedy, this Court is persuaded by a recent relevant decision of the New York State Court of Appeals. In the opinion in *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert, denied*, ___ U.S. ___, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985), with reference to a decision discussing actions brought in New York by the Iranian Government against the Shah and his wife, the Court of Appeals stated that:

> [T]he taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter . . . is so ephemeral.

Islamic Republic at 483, 478, N.Y.S.2d 597, 467 N.E.2d 245 (citations omitted). Administrative concerns weigh against retention of this case.

B. The Interests of India and the United States.

Plaintiffs, and especially *amicus curiae* emphasize this point of argument in opposition to the motion to dismiss. Concerned with the asserted possibility of developing a "double-standard" of liability for multinational corporations, plaintiffs urge that American courts should administer justice to the victims of the Bhopal disaster as they would to potential American victims of industrial accidents.

The public interest is served, plaintiffs and *amicus* argue, when United States corporations assume responsibility for accidents occurring on foreign soil. "To abandon that responsibility," *amicus* asserts, "would both injure our standing in the world community and betray the spirit of fairness inherent in the American character." (*Amicus* Brief at 4). The specific American interests allegedly to be served by this Court's retention of the case include the opportunity of creating precedent which will "bind all American multinationals henceforward," *Amicus* Brief at 20); promotion of "international cooperation," (*Amicus* Brief at 22-23); avoidance of an asserted "double standard" of liability, and the prevention of "economic blackmail of hazardous industries which would extract concessions on health and environmental standards as the price of continuing operations in the United States." (*Amicus* Brief at 20). An additional American public interest ostensibly to be served by retention of the litigation in this forum is advanced by plaintiffs themselves. They assert that the deterrent effect of this case can be distinguished from the situation in *Piper,* where the Court rejected the argument that "American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and [its co-defendant] were tried in the United States, where they could be sued on the basis of both negligence and strict liability." *Piper* 454 U.S. at 260, 102 S.Ct. at 268. The Court stated that:

> [T]he incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

Piper at 260–61, 102 S.Ct. at 268. According to plaintiffs, the potential for greater deterrence in this case is "self-evident."

The opposing interest of India is argued to be ill-served by sending this litigation to India. Pointing to the fact that the Union of India chose this forum, plaintiffs state that there can be "no question as to the public interest of India." (Memo in Opp. at 91). Union Carbide's statements regarding the interests of India in this litigation are summarily dismissed by the plaintiffs, who state that "Union Carbide, whose actions caused the suffering of an entire city, has no standing to assert this belated concern for the welfare of the Indian populace." (Memo in Opp. at 91.)

Union Carbide, not surprisingly, argues that the public interest of the United States in this litigation is very slight, and that India's interest is great. In the main, the Court agrees with the defendant.

As noted, Robert C. Brown states in his affidavit on behalf of Union Carbide that the Indian Government preserved the right to approve foreign collaboration and import of equipment to be used in connection with the plant. *See supra* at 856. In addition Mr. Brown quoted excerpts from the 1972 Letter of Intent entered into by the Union of India and UCIL, one term of which required that "the purchase of only such design and consultancy services from abroad as are not available within the country" would be allowed. (Brown Aff. at 6). Ranjit K. Dutta states that the Indian Government, in a process of "Indianization," restricted the amount of foreign materials and foreign consultants' time which could be contributed to the project, and mandated the use of Indian materials and experts whenever possible. (Dutta Aff. at 35). In an alleged ongoing attempt to minimize foreign exchange losses through imports, the Union of India insisted on approving equip-

ment to be purchased abroad, through the mechanism of a "capital goods license." (Dutta Aff. at 48–50).

The Indian Government, through its Ministry of Petroleum and Chemicals, allegedly required information from UCIL regarding all aspects of the Bhopal facility during construction in 1972 and 1973, including "information on toxicity" of chemicals. (Dutta Aff. at 44). The Ministry required progress reports throughout the course of the construction project. These reports were required by the Secretariat for Industrial Approvals, the Director General of Technical Development and the Director of Industries of Madhya Pradesh. (Dutta Aff. at 45). Moreover, UCIL was ultimately required to obtain numerous licenses during development, construction and operation of the facility. (Dutta Aff. at 46). The list of licensees obtained fills five pages.[21]

The Indian Government regulated the Bhopal plant indirectly under a series of environmental laws, enforced by numerous agencies, much as the Occupational Safety and health Administration, the Environmental Protection Agency and state and local agencies regulate the chemical industry in the United States. (Dutta Aff. at 53–56). Emissions from the facility were monitored by a state water pollution board, for example. (Dutta Aff. at 64). In addition, state officials periodically inspected the fully-constructed plant.[22] (Dutta Aff. at 56). A detailed inquiry into the plant's operations was conducted by the Indian Government in the aftermath of the December, 1981 fatality at the MIC unit and the February, 1982 incident involving

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[21] Indian federal and municipal officials also allegedly conducted on-site inspections resulting in approvals for portions of the construction, including approvals for the flare tower, MIC layout and storage, unit refrigeration and MIC/Phosgene structure. (Dutta Aff. at 45–47; Exs. 102–104).

[22] One such regular inspection appears to have taken place approximately two weeks before the MIC disaster. (Dutta Aff. at 56; Ex. 116).

a pump seal. (Dutta Aff. at 58–62). Numerous federal, state and local commissions, obviously, investigated the most tragic incident of all, the MIC leak of December, 1984.

The recital above demonstrates the immense interest of various Indian governmental agencies in the creation, operation, licensing and regulation, and investigation of the plant. Thus, regardless of the extent of Union Carbide's own involvement in the UCIL Plant in Bhopal, or even of its asserted "control" over the plant, the facility was within the sphere of regulation of Indian laws and agencies, at all levels. The comments of the Court of Appeals for the Sixth Circuit with respect to its decision to dismiss a products liability action on *forum non conveniens* grounds seem particularly apposite. In *In re Richardson-Merrell, Inc.*, 545 F.Supp. 1130 (S.D.Ohio 1982), *modified sub. nom. Dowling v. Richardson-Merrell Inc.*, 727 F.2d 608 (6th Cir.1984), the court reviewed a dismissal involving an action brought by a number of plaintiffs, all of whom were citizens of Great Britain.[23] Defendant in the action was a drug company which had developed and tested a drug in the United States which was manufactured and marketed in England. The suit was brought against the American parent, not the British subsidiary, for injuries allegedly resulting from ingestion of the offending drug in England

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[23] Only a small number of plaintiffs in the Bhopal litigation are United States citizens. Of the 200,000 plaintiffs, approximately nine are American. They have filed the complaints numbered 85 Civ. 0447, 85 Civ. 1096 and 85 Civ. 2098. This is of relative insignificance on this motion to dismiss. "The federal courts have not felt constrained to retain jurisdiction over predominantly foreign cases involving American plaintiffs where an examination of the *Gilbert* factors demonstrated that the action is more appropriately brought in a foreign forum. . . . [T]he presence of a handful of American plaintiffs does not preclude such dismissal." *Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 21 (N.D.Cal. 1982), *aff'd sub. nom., Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983).

and Scotland. The district court, in dismissing the case, stated that:

> This action involves the safety of drugs manufactured in the United Kingdom and sold to its citizens pursuant to licenses issued by that government. The interest of the United Kingdom is overwhelmingly apparent. New York, and Ohio [the United States forums] for that matter, have a minimal interest in the safety of products which are manufactured, regulated and sold abroad by foreign entities, even though development or testing occurred in this country.

In re Richardson-Merrell, Inc., 545 F.Supp. at 1135 (footnote omitted). The Sixth Circuit confirmed this view of the public interests, stating:

> The interest of the United Kingdom in this litigation is great. The drug was manufactured under a British license by British companies and was marketed and prescribed in the United Kingdom. The alleged injuries took place in England and Scotland and the plaintiffs are citizens and residents of those countries. When a regulated industry, such as pharmaceuticals in this case and passenger aircraft operations in *Piper Aircraft*, is involved, the country where the injury occurs has a particularly strong interest in product liability litigation. . . . Though no single factor should be determinative in ruling on a *forum non conveniens* motion, the nature of the product and its status as regulated or not must be considered.

Dowling, 727 F.2d at 616.

The Indian government, which regulated the Bhopal facility, has an extensive and deep interest in ensuring that its standards for safety are complied with. As regulators, the Indian government and individual citizens even have an interest in knowing whether extant regulations are adequate. This Court, sitting in a foreign country, has con-

sidered the extent of regulation by Indian agencies of the Bhopal plant. It finds that this is not the appropriate tribunal to determine whether the Indian regulations were breached, or whether the laws themselves were sufficient to protect Indian citizens from harm. It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country. As another district court stated in the context of a drug product liability action brought by foreign plaintiffs in this country,

> Each government must weigh the merits of permitting the drug's use. . . . Each makes its own determination as to the standards of degree of safety and duty of care. . . . This balancing of the overall benefits to be derived from a product's use with the risk of harm associated with that use is peculiarly suited to a forum of the country in which the product is to be used. . . . The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country.

Harrison v. Wyeth Laboratories, 510 F.Supp. 1, 4 (E.D.Pa 1980), *aff'd mem.,* 676 F.2d 685 (3rd Cir.1982). India no doubt evaluated its need for a pesticide plant against the risks inherent in such development. Its conclusions regarding "[q]uestions as to the safety of [products] marketed" or manufactured in India were "properly the concern of that country." *Harrison* at 4 (emphasis omitted). This is particularly true where, as here, the interests of the regulators were possibly drastically different from concerns of American regulators. The Court is well aware of the moral danger of creating the "double-standard" feared by plaintiffs and *amicus curiae.* However, when an industry is as regulated as the chemical industry is in India, the failure to acknowledge inherent differences in

the aims and concerns of Indian, as compared to American citizens would be naive, and unfair to defendant. The district court in *Harrison* considered the hypothetical instance in which a products liability action arising out of an Indian accident would be brought in the United States. The court speculated as follows:

> The impropriety of [applying American standards of product safety and care] would be even more clearly seen if the foreign country involved as, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. Most significantly, our two societies must deal with entirely different and highly complex problems of population growth and control. Faced with different needs, problems and resources in our example India may, in balancing the pros and cons . . . give different weight to various factors than would our society. . . . Should we impose our standards upon them in spite of such differences? We think not.

Harrison at 4–5. This Court, too, thinks that it should avoid imposing characteristically American values on Indian concerns.

The Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology. The supposed "blackmail" effect of dismissal by which plaintiffs are troubled is not a significant interest of the American population, either. Surely, there will be no relaxing of regulatory standards by the responsible legislators of the United States as a response to lower standards abroad.[24] Other concerns than

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[24] In any event, plaintiffs' "deterrence" and "blackmail" arguments presuppose that Union Carbide would be held more accountable by an

bald fear of potential liability, such as convenience or tax benefits, bear on decisions regarding where to locate a plant. Moreover, the purported public interest of seizing this chance to create new law is no real interest at all. This Court would exceed its authority were it to rule otherwise when restraint was in order.

The Court concludes that the public interest of India in this litigation far outweighs the public interest of the United States. This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system. This interest is of paramount importance.[25]

C. The Applicable Law.

Gilbert and *Piper* explicitly acknowledge that the need of an American court to apply foreign law is an appropriate concern on a *forum non conveniens* motion, and can in fact point toward dismissal. *Gilbert,* 330 U.S. at 509, 67 S.Ct. at 843; *Piper,* 454 U.S. at 260, 102 S.Ct. at 268. Especially when, as here, all other factors favor dismissal, the need to apply foreign law is a significant consideration on this type of motion. *Piper* at 260, n. 29, 102 S.Ct. at 268, n. 29. A federal court is bound to apply the choice of law rules of the state in which an action was originally brought; even upon transfer to a different district, "the transfer district court must be obligated to apply the state law that would have been applied if there had been no

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American than by an Indian tribunal. Certainly, there is a real possibility of a substantial Indian judgment against defendant, which would serve an identical deterrent function, and prevent a rush of multinationals to foreign locations.

[25] While the accident is more than a "local controversy," given the interests of the Indian populace, it is certainly a national controversy which should be "decided at home." *Gilbert* at 508–09. No doubt Indian citizens, many of whom barely are acquainted with their American lawyers, will find the case more accessible if it is tried "in their view" in India.

change of venue." *Van Dusen v. Barrack;* 376 U.S. 612, 639, 84 S.Ct. 805, 821, 11 L.Ed.2d 945 (1964). Thus, this Court, sitting over a multidistrict litigation, must apply the various choice of law rules of the states in which the actions now consolidated before it were brought.[26] Rather than undertake the task of evaluating he choice of law rules of each state separately, the Court will treat the choice of law doctrine *in toto.* The "governmental interest" analysis, employed by many jurisdictions, requires a court to look to the question of which state has the most compelling interest in the outcome of the case. India's interest in the outcome of the litigation exceeds America's, *see supra* at 44–58. The *lex loci delicti* analysis used in other jurisdictions indicates that the law of the state where the tort occurred should be applied. The place in which the tort occurred was, to a very great extent, India. Other states apply the "most significant relationship" test, or "weight of contacts" test, which evaluate in which state most of the events constituting the tort occurred. The contacts with India with respect to all phases of plant construction, operation, malfunction and subsequent injuries are greater in number than those with the United States. Thus, under any one of these three doctrines, it is likely that Indian law will emerge as the operative law. An Indian court, therefore, would be better able to apply the controlling law than would this United States Court, or a jury working with it. This public interest factor also weighs in favor of dismissal on the grounds of *forum non conveniens.*

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[26] Upon a cursory review of the individual complaints comprising this action, the Court notes that suits were brought in California, Connecticut, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New Jersey, New York, Pennsylvania, Tennessee, Texas and West virginia, at a minimum.

CONCLUSION

It is difficult to imagine how a greater tragedy could occur to a peacetime population than the deadly gas leak in Bhopal on the night of December 2–3, 1984. The survivors of the dead victims, the injured and others who suffered, or may in the future suffer due to the disaster, are entitled to compensation. This Court is firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability. Further, the Indian courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims.

The presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for the consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India. All of the private interest factors described in *Piper* and *Gilbert* weigh heavily toward dismissal of this case on the grounds of *forum non conveniens.*

The public interest factors set forth in Piper and *Gilbert* also favor dismissal. The administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweigh the interest of India in applying Indian law and Indian values to the task of resolving this case.

The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which affected its citizens on its own soil.

Perhaps Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interests of citizens of the United States in the litigation.

Plaintiffs, including the Union of India, have argued that the courts of India are not up to the task of conducting the Bhopal litigation. They assert that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people.

The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rule, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its court have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.

This Court defers to the adequacy and ability of the courts of India. Their interest in the sad events of December 2-3, 1984 at the UCIL plant in the City of Bhopal, State of Madhya Pradesh, Union of India, is not subject to question or challenge. The availability of the probative,

relevant, material and necessary evidence to Indian courts is obvious and has been demonstrated in this opinion.

Therefore, the consolidated case is dismissed on the grounds of *forum non conveniens* under the following conditions:

1. Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations;

2. Union Carbide shall agree to satisfy any judgment rendered against it by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process;

3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

SO ORDERED.

[Excerpts From Brief In Opposition To Motion To Dismiss On The Grounds Of *Forum Non Conveniens*]

I. STATEMENT OF THE CASE

The Plaintiffs' Executive Committee respectfully submits the following points and authorities in opposition to the motion of defendant Union Carbide Corporation ("Union Carbide") to dismiss these actions on the basis of *forum non conveniens,* a doctrine intended to serve the ends of justice.

The Bhopal victims, and the Union of India, came to the courts of the United States for the sole reason that it is in this forum alone in which justice can be secured. The courts of India simply do not offer a forum adequate to meet the needs of this litigation. Effective jurisdiction over Union Carbide in India is doubtful, and procedural and discovery deficiencies in the Indian legal system would thwart the victims' quest for a just and expeditious resolution of this litigation. The fundamental structure of the Indian judicial system could result in decades of litigation if the victims are denied their chosen forum. This litigation presents the extraordinary situation of a foreign sovereign, recognizing the inadequacies of its developing system of jurisprudence, seeking justice for its people in an American court.

Justice also mandates the resolution of this litigation in the United States because the material qualitative evidentiary facts at the heart of the liability issues can be discovered only in this country, where the seeds of the Bhopal tragedy lie.

a chronic and intractable feature of the institutional structure of the Indian legal system. The implications of the massive delays are obvious should the Bhopal litigation be sent to India. As the Union of India stated:

> Due to procedural constraints and the pending backlog of cases, the adjudication in India of

> claims arising from the Bhopal disaster would inevitably lead to delay of such magnitude that the prosecution of such claims would effectively be frustrated.

Answer to No. 93 of Defendant's First Requests for Admissions, Exhibit 55.

The enormity of this delay was the subject of an extraordinary conference in August-September 1985 of the Chief Justices of the Indian High Courts and Chief Ministers and Law Ministers of the states, which noted that the long-standing problem of arrears was worsening. Indeed, with a backlog of more than 10 million cases, the problem is deeply rooted.

As of July 1985, more than 40,000 civil cases were pending in the Supreme Court of India alone.[6] Half of the nonconstitutional cases have been pending in the Supreme Court for four years. One-eighth of the cases have been before the Supreme Court for at least 10 years. These statistics reflect only the pendency of the cases after reaching the Supreme Court and not the number of years spent in the lower courts. The Supreme Court

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[6] In addition to its civil docket, the Supreme Court also had pending approximately 44,000 criminal matters.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL Docket No. 626
Misc. No. 21-38 (JFK)
85 Civ. 2696 (JFK)
ALL CASES

IN RE: UNION CARBIDE CORPORATION GAS LEAK DISASTER AT BHOPAL, INDIA IN DECEMBER 1984

AFFIDAVIT OF MARC S. GALANTER

[Excerpted]

AFFIDAVIT

I, Professor MARC SELIG GALANTER, of 109 North Roby Road, Madison, Wisconsin, do hereby depose and declare that the following is true and correct to the best of my knowledge and recollection:

I. QUALIFICATIONS OF THE AFFIANT

Education: I attended the University of Chicago and received the degrees of B.A. (with Honors in the Social Sciences and General Honors) in 1950; M.A. in 1954; and J.D. in 1956. I was Book Review Editor of the *University of Chicago Law Review*. In 1957-58, I was a Fulbright Scholar at the Faculty of Law of Delhi University in India.

Employment: In 1958-59, I was Assistant Professor and Assistant Director of the South Asian Government Lawyer Program at Stanford Law School. From 1959-71, I was a Visiting Assistant Professor (1959-60), Assistant Professor (1960-66), and Associate Professor (1966-71) of the Social

Sciences at the University of Chicago. From 1971-76, I was Visiting Professor of Law (1971-72) and Professor of Law (1972-76) at the State University of New York at Buffalo. In 1976-77, I was Visiting Professor of Law at the University of Wisconsin-Madison. Since 1977, I have been Professor of Law and South Asian Studies at the University of Wisconsin. In 1984, I was appointed the Evjue-Bascom Professor of Law.

Honors: Phi Beta Kappa; Grantee, National Science Foundation (1972, 1976, 1982); Fellow, National Endowment for the Humanities (1979-80); President, Law and Society Association (1983-85); Fellow, John Simon Guggenheim Memorial Foundation (1986-).

Teaching: Throughout my academic career, I have been actively engaged in research and teaching about the law of India. At Chicago, Buffalo and Wisconsin I have given specialized Seminars on Indian Law and have directed the research of individual students. I have supervised doctoral dissertations on Indian Law topics and have assisted students from Chicago, Northwestern, Princeton, Harvard, Buffalo, Wisconsin and Berkeley, as well as from Indian universities, in their Indian research.

At Stanford Law School, I was Assistant Director of a training program for government lawyers from newly-independent South Asian countries. At the University of Chicago, I participated for a number of years in teaching a year-long interdisciplinary course on Indian Civilization, of which I served as chairman (1963-65). I organized the first conferences on South Asian law to be held in the United States (1965, 1968). I organized an intensive summer workshop on research in Indian Law (held at Northwestern University Law School in 1970) which numbered among its students some of the most prominent figures in legal scholarship in South Asia today. Subsequently, I collaborated with alumni of that 1970 Workshop on the Asian Legal Aid Workshop (held in Berkeley, California

in 1974) and the Socio-Legal Workshop held in Colombo, Sri Lanka in the same year. I organized an international conference on the Career and Prospects of Indian Law, held in Madison in 1982. I also served (1978-81) as a major consultant on a prize-winning film "Courts and Councils in India," produced by the University of Wisconsin South Asia Center and funded by the Smithsonian Institution. I have lectured on Indian law topics at many American and Indian universities and research institutions, and before bar and community groups.

Research and Publications: I have written some fifty books, articles, chapters, reports and reviews on Indian legal topics. [These are listed in Part 1 of Attachment A] My recent book, *Competing Equalities: Law and the Backward Classes in India* has been cited by the Supreme Court of India in *K.C. Vasanth Kumar v. Karnataka*, 1985 (1) SCALE 832, 833, 837-38, 875 (1985).

In 1965-66, I went to India as a Faculty Fellow of the American Institute of Indian Studies to do research on the implementation of India's counterpart of affirmative action policies and on the litigation surrounding such policies. While there, I was a Visiting Scholar at the Indian Law Institute. Since my research involved litigation in a number of Indian states, I had an opportunity to observe and interview lawyers and judges in many parts of India. This research was continued and extended in the course of visits to India in 1968, 1972, 1974, and 1978.

In addition to my specialized work on India, I have engaged in research on dispute resolution, litigation, and the legal profession in the United States. [My publications on other than Indian topics are listed in Part 2 of Attachment A].

Consulting and Professional Service: As an extension of my own research and teaching on Indian law, I served on various commissions and advisory bodies. I organized the Committee on Asian Law of the Association for Asian

Studies and served as its chairman from 1969-73. From 1973-76, I served on the South Asian Regional Council, and from 1974-76 on the Board of Directors of the Association of Asian Studies. From 1975-79, I served on the Joint Committee on South Asia of the American Council of Learned Societies and the Social Science Research Council.

In 1972, I toured Indian universities and research facilities as a consultant to the International Legal Center and prepared a report on the prospects for social research about Indian law. From 1981 to 1984 I served as consultant to the Ford Foundation's New Delhi office on its Human Rights and Legal Services programs. In that capacity I made six visits to India ranging from three to six weeks, during which I interviewed lawyers, judges, and community workers about the potential use of law to protect and advance the interests of women, minorities, the rural poor and other underrepresented groups. These visits afforded me an opportunity to familiarize myself with innovations in the delivery of legal services in India.

From 1971-73, I was a member of the International Legal Center's Research Advisory Committee, which undertook a comprehensive survey of the relation of law to national development in the Third Word. From 1974-1977, I served on the Center's Committee on Research and Training. Since 1977 I have been a member of the Working Group on the Comparative Study of the Legal Profession, established by the Research Committee on the Sociology of Law of the International Sociological Association. From 1981 to 1983, I chaired the Commission on Folk Law and Legal Pluralism of the International Congress of Anthropological and Ethnological Sciences. Since 1983, I have been a member of the Board of Directors of the International Third Legal Studies Association.

I was editor of the *Law & Society Review* from 1972-76 and served on the editorial boards of many other schol-

arly journals. I have been a member of various advisory and consultative bodies, including the Research Advisory Committee of the Law and Social Program of the National Science Foundation (1976-78), the Committee on Law and Social Science of the Social Science Research Council (1975-84), and the Council on the Role of Courts (1979-83). In 1983, I was a consultant to the National Institute of Dispute Resolution.

Experience and Personal Knowledge: In the course of my research and consulting work, I have interviewed innumerable Indian lawyers at all levels of the system, from Supreme Court practitioners to lawyers in sub-district towns, and I have observed them at work, interacting with one another and with clients as well as with courts. I have observed courts at all levels; I have spoken at length with judges, government officials, journalists, academic observers, with advocacy groups and with many users and would-be users of the legal system. The duration of my involvement with Indian law was enhanced opportunities for access and frank exchange. In addition, the ability to make repeated observations and to re-examine earlier views has enabled me to appreciate patterns of change and stability and to place current observations in perspective.

II. INDIA HAS A COMMON LAW LEGAL SYSTEM, BUT ONE THAT HAS ONLY INCOMPLETELY EMERGED FROM THE HERITAGE OF COLONIAL RULE

A. India is a Federal System with a Unified Structure of Courts which Operate According to Common Law Principles

India is a common law system. The structure and powers of courts, the roles of judges and lawyers, the adversary system of trial, the reliance on judicial precedent, the doctrine of sixty-two percent of filings to forty percent. The priority accorded constitutional liberties is evidenced by the fact that at the end of 1984, constitutional cases made

up a disproportionately small thirty-nine percent of the backlog and civil appeals a disproportionately large fifty-three percent. Thirty years of expansion of constitutional rights have absorbed the energies and resources of the courts, leaving ordinary civil litigation neglected and undeveloped.

III. THE INDIAN SYSTEM IS CHARACTERIZED BY MASSIVE BACKLOGS OF CASES AND ENORMOUS DELAYS IN THE RESOLUTION OF CIVIL CASES

A. Backlog and Delay are Built into the System

One of the fundamental structural causes of delay is the relatively small size of the judicial establishment in India. The Law Commission refers to the "insufficient number of judges" as a cause of delay. (Law Commission, 27th Report (1964), p. 9)

More pointedly, Professor Jain refers to "the paucity of courts," which he traces into the colonial period, as "one of the most important factors contributing to the law's delay." M.P. Jain, *Outlines of Indian Legal History* (4th Ed., 1981) p. 155) This observation is confirmed by available data on the number of judges in the various common law countries. India has only 10.5 judges per million population. The comparable figure for the United States is 107 per million; for Australia, 41.6 per million; for Canada, 75.2 per million; for England and Wales, 50.9 per million. In a vast country of seven hundred million, roughly three times the population of the United States, there are less than one-third as many judges—about one-tenth as many on a per capita basis. [Sources and computations for these figures will be found in Attachment C.]

These Indian judges, it should be noted, work in the poorest physical facilities, with the least qualified support staff; and with very low remuneration. In view of the poor physical facilities and the absence of supporting staff, the

disparity in the quantitative presence of courts is even greater than suggested by these numerical comparisons.

The engrained work habits and culture of lawyers make for inefficient use of these scarce judicial resources. Lawyers are habituated to time-consuming oral presentations rather than to presentation of written motions and briefs. There is a long-reserved tendency to overprove allegations, essential and inessential, to protract cross-examination, to engage in prolix argument. All of these traits, observed sixty years ago by the Rankin Committee (Civil Justice Committee 1924-25, chs. 3-6) are again in evidence today. (Baxi, *The Crisis of the Indian Legal System* (1982) pp. 74-75)

On recurrent way of coping with chronic overload is to do cases in fragments. The Law Commission found that the provision for continuous hearing of a case once begun was ignored in many courts:

> Day after day the cases were/are adjourned either because the lawyers are engaged elsewhere or because the court is otherwise busy. Indeed, so chaotic were the files, that cases often adjourned to a future date only for the purpose of fixing the next date of hearing. . . . In various States we found the subordinate judiciary acting as if they understood. . . . interrupted hearings should be the rule and day-to-day hearings the exception. We found in some State[s] the cross-examination of a witness spread over several hearings with breaks running in some cases into months. It seemed to be the invariable practice to adjourn the case after the closing of the plaintiff's evidence and before the starting of the defendant's evidence. It would also appear to be common practice to adjourn the case after the recording of evidence is complete to enable the counsel to prepare their arguments. A further adjournment

> invariably takes place after the arguments are closed for the judge to deliver his judgment. It needs to be emphasized that every step in this method of what may be described as the hearing of a suit through a series of adjournments, is contrary to the Code. Law Commission, 14th Report (1958) p. 335.

Twenty years after this bitter castigation, we find another Law Commission report conceding that:

> . . . at present . . . the practice prevailing in most of the courts is to record evidence in installments. Law Commission, 77th Report (1978) p. 20.

The consequent fragmentation of professional effort is reflected in the finding of a study of a district court bar that civil lawyers on the average appear in 14.3 court proceedings each day. (J.S. Gandhi, *Lawyers and Touts: A Study in the Sociology of the Legal Profession* (1982) p. 89)

Superimposed on these stultifying practices in the trial court are opportunities for a profusion of appeals.

> Since the early [eighteen hundred] seventies, the Indian legal system has met with the criticism that it permits a multiplicity of appeals causing enormous delays and costs. . . . There may be—and there, not infrequently are—cases where the same matter may be given three or four or even five hearings. . . . Even the party emerging as the ultimate victor may find that he has achieved only a pyrrhic victory, for his unrecoverable costs may exceed the value of the judgement he has obtained. . . . [A] litigant today. . .can never know where his case will end. Law Commission, 14th Report (1958) p. 363.

There are not only appeals of final decisions, but a profusion of opportunities for interlocutory appeal. A vast number of rulings and orders can be appealed, staying the proceedings for years. A recent Supreme Court case lists some fifteen types of orders that it felt had the requisite finality to be appealable. (*Shah Babulal Khimji v. Jayaben*, A.I.R. 1981 S.C. 1786, 1817) [The Court's list is given in Attachment D.] And where an appeal will not lie, there is the possibility, often availed of, of applying for a revision under Code of Civil Procedure, Sec. 115 which authorizes the High Court to:

> . . . call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—
>
> (a) to have exercised a jurisdiction not vested in it by law, or
>
> (b) to have failed to exercise a jurisdiction so vested, or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
>
> the High Court may make such order in the case as it thinks fit.

[The full text of Sec. 115 may be found in Attachment E]. The Law Commission noted that

> Considerable delays arise in the disposal of the proceeding in the course of which these revisions against interlocutory orders are filed. When a rule *nisi* is issued, the proceeding in the lower court is generally stayed and its further progress is held up during the pendency of the petition in the High Court. Further, whenever a rule is issued on such applications, the record of the case

> is generally called for from the subordinate courts so that, even when no order of stay has been made, the subordinate court cannot proceed in the absence of the record and thus there is, in effect, an automatic stay of proceedings. Law Commission, 14th Report (1958) p. 416.

India's colonial rulers established broad provisions for interlocutory appeals as a method of having the (mostly British) superior courts monitor the work of the (mostly Indian) lower courts. Common law procedure was distorted by the distrust and feeling of superiority engendered by colonial rule. Alan Bledhill, a colonial High Court judge who later became Professor of Oriental Laws at the University of London explained that

> Though the procedure in the courts is based on English procedure, there are important differences. In the first place, it seems based on the assumption that the lower courts are incompetent to do anything more than prepare a record of evidence and that the real contest is in the court of first appeal. "The Expansion of the Judicial Process in Republican India," in *Some Aspects of Indian Law Today = International and Comparative Law Quarterly* Supplementary Publication No. 8 (1964) pp. 4, 13.

To the vast opportunities for interlocutory appeals under the provisions of the Code of Civil Procedure and the Letters Patent of the various High Courts, the Constitution's thrust to open citizen access to the highest authorities, has super-added even further opportunities for such appeals. Article 136(1) provides:

> Notwithstanding anything in this Chapter [on the Union Judiciary], the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or or-

> der in any cause or matter passed or made by any court or tribunal in the territory of India.

This provision extends to "any . . . order"—and the qualifier "final" is not used, as it is elsewhere, so that appeal from an interlocutory order is possible.

A multiplicity of opportunities for such appeals results from the tendency of overworked courts to avoid decision on all the issues in a case. The Law Commission observed that:

> Considerable delay is often caused by the tendency of courts to avoid the decision of all the matters in issue in a suit, on the ground that the suit could be disposed of on a preliminary point. In such cases, when the decision of the trial court on the preliminary point is reversed in appeal, the matter has ordinarily to be remitted to the trial court again, with the result that the inquiry into other issues commences after the expiry of a long period of time, when documents might have been lost, the memory of witnesses might have faded, and in general, the grip of the judge over the litigation would have been lessened. Law Commission, 54th Report (1973) pp. 12-13.

B. Backlog and Delays have been Present for so Prolonged a Period that They can be Considered a Permanent Feature of the Indian System

Observers concur on the chronic and intractable nature of these problems. Professor Jain concludes that:

> the problem of law's delay has been a perennial problem in the Indian judicial sphere since the introduction of the Cornwallis code in 1973. It has engaged the attention of the government from time to time, but still it has defied solution. Jain, *Outlines of Indian Legal History,* (4th ed. 1981) p. 254

Almost 20 years to the day before the Bhopal disaster the Law Commission observed:

> the appalling backlog of cases . . . has unfortunately become a normal feature of nearly all the courts of the country, [and] the problem of delay in the law courts has assumed great importance. Law Commission, 27th Report (1964) pp. 6-7.

On August 31-September 1 of 1985, an extraordinary Conference of Chief Justices of the High Courts, Chief Ministers and Law Ministers of the States was held to address the problem of backlog, which had mounted to over ten million cases pending in the courts of India. [The escalating backlog in the Supreme Court is detailed in Attachment F.] The Agenda Notes, after recounting the last decade of proposals for reform conclude that:

> Unfortunately, there has been no perceptible improvement in the situation and the arrears are increasing steadily. Agenda Notes, p. 2.

The impact of these immense backlogs is palpable in the extreme prolongation of cases. Examples are legion of cases as long as the fabled Jarndyce v. Jarndyce of Dickens' *Bleak House.* In *Bechan Pandey v. Dulhin Janki,* A.I.R. 1976 S.C. 866, the Court observed that the suit has been filed in January, 1950. Many of the original plaintiffs and defendants had died and their legal representatives had been substituted as parties. The Court declined to remand the suit to the trial court, observing:

> The Court should be loathe to entertain a plea in a case like the present which would have the effect of condemning succeeding generations of families to spend a major part of their lives in protracted litigation. A.I.R. 1976 S.C. 866, 869.

In that same year the Supreme Court decided *L. Babu Ram v. Raghunathji,* A.I.R. 1976 S.C. 1734, another suit

instituted in 1950 that took nearly twenty-six years to be disposed of. Justice (now Chief Justice) Bhagwati observed

> At long last, the unfortunate and heroic sage of this litigation is coming to an end. It has witnessed a silver jubilee, thanks to our system of administration of justice and our callousness and indifference to any drastic reforms in it. *Cases like this, which are not infrequent,* should be sufficient to shock our social as well as judicial conscience and activise us to move swiftly in the direction of overhauling and restructuring the entire legal and judicial system." [emphasis supplied] A.I.R. 1976 S.C. 1734, 1735.

Ten years later, in July 1985, the author of that observation ascended to the chief justiceship. At that time the Supreme Court's docket promised a continuing harvest of such ancient cases. These are not occasional anomalies. Putting aside its criminal caseload, the Supreme Court of India on July 1, 1985 had pending before it some 15,017 constitutional cases and 25,062 non-constitutional cases. Of the latter, roughly half (12,591) had entered the Supreme Court in 1981 or earlier. Roughly one quarter (6446) had entered the Supreme Court in 1978 or earlier. A total of 3,088 of these cases had been filed with the court in 1975 or in earlier years, some as far back as 1969. [Attachment J gives details of the age of the backlog in the Supreme Court as of July 1, 1985.] It should be noted that since these are cases that came to the Supreme Court after spending many years in lower courts and tribunals, the total duration of the suits is far greater than the period of their pendency in the Supreme Court.

C. In Tort Cases Delay is Both General and Extreme

The effect of these delays is particularly devastating in tort cases, where injured parties or their survivors must wait decades for compensation. For example, a simple accident claim by a widow with four [then] minor children

seeking compensation for the death of her husband who had been run over by a truck, dragged on in the courts for eighteen years. *Bishan Devi v. Sirbaksh Singh,* A.I.R. 1979 S.C. 1862, was a claim under the Motor Vehicles Act, so the case started out before a tribunal established for the express purpose of simplifying and expediting claims. In his judgment, Kailasam, J. was

> tempted to remark that they would have been better off but for their hope of getting some relief in courts. They not only had to spend their time in courts but to borrow to fight for their rights. It is common knowledge that such helpless and desperate condition is exploited by unscrupulous persons who manage to get away with the bulk of the compensation money if and when the claimants succeed in getting it. A.I.R. 1979 S.C. 1862, 1866.

This case, while somewhat longer than average, is not a unique and aberrational instance. Tort cases in India take a long time to be resolved. The law professor who surveyed the Law of Torts for the Indian Law Institute's 1971 Annual Survey of Indian Law provided data on the ten tort cases that were reported that year. The duration of the cases from date of filing of the suit to date of the reported decision ranged from six years and five months to eighteen years and one month. The average duration of these cases was eleven years, one month and sixteen days—and this understates the average because at least one of them was slated to have further proceedings. (S.D. Balsara, "Law of Torts" 7 *Annual Survey of Indian Law* 310, 326 (1971))

To see whether these conditions of extreme delay had changed in the last fifteen years, I conducted a survey of all the tort cases reported in the last ten years in the *All-India Reporter.* The *All-India Reporter* is the most comprehensive, most widely used, and most often-cited series

of law reports in India. It occupies a position roughly analogous to the West System of law reporters in the United States. It has been published continuously since 1914. Before Independence, it reported decisions of the High Courts and of the Courts of the Judicial Commissioners of those provinces without High Courts, as well as the decisions of the Judicial Committee of the Privy Council in cases from India. Since Independence, it reports the decisions of the Supreme Court and the High Courts in each state. These are the only courts whose decisions are published and become part of the accessible body of precedent. In its volumes from 1975 to 1984 inclusive, the *All-India Reporter* provided reports of some 56 tort cases as well as 360 cases under the Motor Vehicles Act. In the Motor Vehicles Act cases, the average time elapsed from event to decision was approximately eight years and four months, and from filing to decision about seven years and eight months. The basis for these calculations will be found in Attachment H, [Table 2.] The other tort cases took even longer: for the 45 cases on which data is available, the average time elapsed from the injurious event to the court decision was thirteen years and five months, and from filing to decision twelve years and nine months.

Almost all of these cases have terminated in the High Courts. For those cases that proceed to the Supreme Court, the delays are even longer. During the entire thirty-five year period since its establishment in 1950, the Supreme Court has given decisions in only eighteen tort cases. (These are all the twenty-four cases listed under tort in the index to the *All-India Reporter* minus three which were Motor Vehicles Act cases and three in which the tort question was peripheral to the matter for decision.) The average time taken by these cases is seventeen years and six months from event to Supreme Court decision. In two of these cases the decision was not the end of the case, the matter being remanded for further proceedings. [Details in Attachment I.]

At its best, the Indian legal system's treatment of civil claims is slow and cumbrous. The tort matters that have come before the higher courts in India do not, as described in Part IV below, involve matters of great technological complexity nor massive amounts of evidence and experts, nor large number of parties. Yet such relatively simple cases of a kind familiar to lawyers and judges can stretch over decades. The Indian system provides a determined antagonist who has the resources to hire skilled lawyers with ample opportunity to prolong litigation. Complex and innovative litigation beyond the experience of lawyers and judges, involving many parties, vast amounts of evidence, the need for judicial rulings on many points of procedure, evidence, liability and damages, would multiply the possibilities of delay.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL #626 MISC. No. 21-38 (J.F.K.)

ALL CASES

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984

MOTION FOR FAIRNESS HEARING

On May 12, 1986, this Court entered an order dismissing a consolidated complaint filed by the Plaintiff's Executive Committee on behalf of thousands of plaintiffs in Bhopal, India, on the grounds of forum non conveniens. This Court had graciously consented to dealy the entry of its opinion and order in the case at the request of all parties involved, because it was believed that a global settlement of the claims was at hand.

Ultimately, a settlement agreement was reached between the two members of the Executive Committee appointed by the Court to speak for all of the individual counsel and defendant Union Carbide, for approximately three hundred fifty million dollars ($350,000,000.00). This sum was deemed adequate by those appointed by the Court to negotiate a settlement for the victims to fairly compensate those entitled to benefits arising from 1757 deaths, fifteen to twenty thousand patients who received or are receiving medical treatment in varying degrees, and between one hundred thousand and two hundred thousand victims who were merely affected but did not receive treatment. When the funds in question were allocated among the groups described, it would appear that individual benefits are far greater than plaintiffs in India—particularly from a society at the general economic level of Bhopal—

have ever received at the hands of the Indian Courts. Liaison Counsel, although not officially voting on the issue, was solicited for his always valuable views and supported the position of the Court's appointees.

Had it not been for the opposition of the Union of India, claiming through counsel that the offer was inadequate, the decision of May 12, however correct in law, would not have been necessary. Virtually all of the American and Indian lawyers who have undertaken to pursue the rights of these plaintiffs are in accord that the settlement is well within the bounds of adequacy. All are equally convinced that if the case is returned to India the victims may receive no compensation for a long period of time, and may ultimately receive less than is now offered.

The case is therefore in a posture believed to be unique in the annals of disaster litigation. Those licensed to practice law in U.S. Courts and the defending company have reached an accord. It should be noted that this was not easily accomplished. Counsel appointed by the Court spend many hours in serious negotiations with Union Carbide. An initial offer of one hundred million dollars ($100,000,000) was, over a period of eight months, negotiated upwards in favor of the plaintiffs to the sum presently offered, or a factor of 350%. At the request of all counsel, the Court, despite the fact that for many months it has been presiding over a difficult and complex criminal case, worked evenings and weekends to assit these negotiations. In the course of these efforts, the Court interviewed high officials from Union Carbide, and victims, doctors and officials from India. At the request of all counsel, the Court met individually with the various parties sounding out their views, settlement rationale, and the like. Indeed, those who participated might conclude that the Court's mention that it labored long and hard to assist settlement is a masterful understatement.

Without taking issue with the Court's ruling on the principal issue, it is fundamentally the right of any litigant to pursue settlement at any time. Counsel for the individual plaintiffs, speaking through the committee lawyers selected by the Court (as opposed to counsel selected by the Union of India) wish to pursue the standing offer of settlement at least to the point that they have fully discharged their obligations to their clients according to standards in America, not in some other land, for it is in America that they have sought relief and in America they are entitled to get it by way of fair settlement if not by way of trial.

No class has been certified in this case, but implicit in the Court's original appointment of a Plaintiff's Executive Committee was a purpose to further and protect the rights of the plaintiffs. In the present posture of the case all we know is that the Union of India, which claims the right by Indian Statute to declare itself fit to practice law in a U.S. District Court, is the sole opponent to a settlement. The Union of India was so bold on May 20, 1986, to inform the Court that it "will move to dismiss" all the plaintiffs' claims to frustrate the ability of plaintiffs individual attorneys to appeal the Court's ruling. Significantly, the Union of India offers not a scintilla of evidence to show that the victims have been informed as to what they would receive if they elected to settle now, what problems they may face in litigation in India if remedies are pursued there, and when payment may be expected in view of India's historical difficulties in getting cases to trial within less than ten years. Lawyers don't refuse proposals of settlement, clients do, after being given enough information to make a knowing and intelligent understanding decision.

Because the Court has spent a great amount of time becoming familiar with the many problems and details involved in this case, the Court is still in a position to offer help to these plaintiffs. We aver on their behalf that they would like that opportunity.

We therefore move that the Court, without delaying the legal proceedings which may flow from the rendition of its decision on questions of law, conduct a hearing to determine whether the settlement proposed for these plaintiffs is fair and reasonable. We respectfully suggest that evidence ought to be taken relevant to the following questions:

A. To what extent have the victims been informed as to what amounts of money they would receive individually if the present offer were accepted?

B. Do these victims wish to renounce the retainers they have signed with their American counsel, or do they wish American counsel to continue to negotiate on their behalf even if the case is transferred to India?

C. What have they been told about what monies they can expect to personally receive if they litigate in India, and approximately when?

D. In all the circumstances of this unique case, is the settlement within the bounds of fairness or is it so low as to be unconscionable, especially as against realistic alternatives?

E. From the facts set forth in the Court's opinion, it is plain that one of the parties responsible for the gas leak may well be the Union of India itself, as counsel for Union Carbide informed the Court at our very first hearing over a year ago. Have the plaintiffs been informed of this fact, so that they may fully protect themselves, or has the Union of India given them self-serving advice detrimental to their interests?

F. Can any potential defendant in a tort action be allowed to claim that it nonetheless represents, as a lawyer, the victims of the tort, in America or in India?

G. Do those victims who purport to reject settlement at this time in hopes of a greater net value in the future

(presumably the only rational ground for rejecting a money settlement) understand that their alleged "counsel", the Union of India, refused to accept any responsibility to account to the Court for the distribution of $5,000,000.00 made available by Union Carbide, as interim relief—at the urging of this Court over one year ago. As a result, it was necessary for the American Red Cross to be importuned to accept responsibility for the distribution of this interim relief to the Indian Red Cross. To date, only $2,000,000.00 of this amount has been transferred to the Indian Red Cross, and there is no record as to how much has been utilized and for what purpose. It also appears that the Union of India has not played any role in the distribution of the interim relief proceeds.

H. As to those victims who wish to elect to settle presently within the terms offered, ought not the Court, as part of its original and continuing purpose to see that the victims are fairly treated, and make every effort to achieve a settlement in accordance with the desires of the victims as expressed by their counsel and the defendant herein. Such disposition of this case would be consistent with the basic underpinnings of our tort system which permit victim and tortfeasor to enter into a voluntary settlement of the claim at any stage of the litigation.

Counsel undersigned respectfully request that if the Court for any reason is unable to hear the matters above-listed, that consideration be given to assigning such a hearing to Magistrate Dollinger, who has served the Court and the parties well in this case on prior occasions.

Dated: New York, New York
May 21, 1986

INDIVIDUAL MEMBERS OF
PLAINTIFFS' EXECUTIVE
COMMITTEE
F. LEE BAILEY
STANLEY M. CHESLEY

By: /s/ UNREADABLE
for F. LEE BAILEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL No. 626
Misc. No. 21-38 (JFK)
ALL CASES

IN RE: UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984

O R D E R

JOHN F. KEENAN, United States District Judge:

The Court makes the following determinations with respect to its opinion and Order of May 12, 1986.

1. No stay of the Opinion and Order is granted at this time. No applicable statute of limitations shall begin to run until 12 months after the date of the entry of the order of this Court dismissing the consolidated case, or in the event a stay is granted by this or any other tribunal, until 12 months after the stay is lifted, whichever is later.

2. No alterations or amendments to any of the three conditions at pages 62-63 of the Opinion and Order are being made by the Court, except for clarification of the second conditions as set forth in paragraph 1 above.

3. Union Carbide shall indicate its acceptance or rejection of the three conditions contained in the Opinion and Order by or before 5:00 P.M. June 12, 1986. A writing signifying Union Carbide's position is required.

4. Individual plaintiffs' counsels' motion for a fairness hearing is denied. The Court finds that a settlement of this case is not practicable absent the agreement of the Union of India to accept and abide by the terms of a settlement. The Union of India, through its counsel, has indicated no settlement will be made at this time.

5. The Opinion and Order is conditional only. It shall become final and appealable on the date Union Carbide's response to the conditions is received, on or by June 12, 1986.

SO ORDERED.

Dated: New York, New York
May 28, 1986

/s/ JOHN F. KEENAN
JOHN F. KEENAN
U.S.D.J.